EXHIBIT 5

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	
	)	
Petition of Z-Tel Communications, Inc. For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas	)	CCB/CPD File No. 01-19

EIGHTH REPORT AND ORDER AND FIFTH ORDER ON RECONSIDERATION

Adopted: May 13, 2004 **Released: May 18, 2004**

By the Commission: Chairman Powell issuing a statement.

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I. INTRODUCTION

1. As part of its effort to establish a pro-competitive, deregulatory national policy framework for the United States telecommunications industry, the Commission, in the *CLEC Access Reform Order,* adopted a new regulatory regime for interstate switched access services provided by competitive local exchange carriers (competitive LECs) to interexchange carriers (IXCs).[1] Specifically, the Commission limited to a declining benchmark the amounts that competitive LECs may tariff for interstate access services, restricted the interstate access rates of competitive LECs entering new markets to the rates of the competing incumbent local exchange carrier (incumbent LEC), and established a rural exemption permitting qualifying carriers to charge rates above the benchmark for their interstate access services.[2] In this Fifth Order on Reconsideration, we resolve seven petitions for clarification and/or reconsideration of the *CLEC Access Reform Order*.[3] As explained in further detail below, we clarify certain aspects of the *CLEC Access Reform Order* and deny the petitions for reconsideration.[4] We also address and deny a pending petition seeking a temporary waiver of section 61.26(d) of the Commission's rules.[5] In the Eighth Report and Order, we decline to set a separate access rate for originating 8YY

[1] *See In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (*CLEC Access Reform Order*).

[2] *See generally id.*

[3] A complete list of the pleadings filed is contained in Appendix B.

[4] In addition to the petitions for clarification and/or reconsideration, several parties requested that the Commission stay the *CLEC Access Reform Order* pending reconsideration or judicial review. *See* Mpower Communications Corp. and North County Communications, Inc., *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Emergency Petition for Stay of Order, June 18, 2001 (Mpower Petition for Stay); TDS Metrocom, Inc., *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Petition for Stay Pending Reconsideration, June 28, 2001 (TDS Petition for Stay); Letter from Jonathan E. Canis, Counsel to Business Telecom, Inc. *et al.*, to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 96-262 (filed May 25, 2001) (requesting that the Commission stay the effective date of the *CLEC Access Reform Order* on its own motion) (Joint CLEC May 25 *Ex Parte*). After the Commission did not act on the request for a stay, Mpower and North County sought a stay from the D.C. Circuit Court of Appeals. On June 28, 2001, the D.C. Circuit denied the request for a stay. *See Mpower Communications Corp, et al. v. FCC,* No. 01-1280, Order dated June 28, 2001. We now deny as moot the Mpower Petition for Stay.

[5] *See In the Matter of Petition of Z-Tel Communications, Inc. and Z-Tel Communications of Virginia, Inc. for Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Services in Certain Metropolitan Statistical Areas*, filed Aug. 3, 2001 (Z-Tel Waiver Petition).

traffic and allow it to be governed by the same declining benchmark as other competitive LEC interstate access traffic.

II. BACKGROUND

2. In the *CLEC Access Reform Order,* the Commission addressed a variety of issues arising from market disputes between IXCs and competitive LECs over the level of competitive LEC interstate access rates.[6] The Commission observed that competitive LEC access rates varied dramatically, and that access rate disputes between IXCs and competitive LECs created significant financial uncertainty for both groups of carriers.[7] Moreover, the Commission found that carrier disputes appeared likely to threaten network ubiquity, a result that the Commission concluded could have significant public safety ramifications.[8] In order to ensure that competitive LEC access rates are just and reasonable, the Commission sought to eliminate regulatory arbitrage opportunities that previously existed with respect to tariffed competitive LEC access services.[9]

3. The Commission concluded that the market structure for access services prevented competition from effectively disciplining prices.[10] It explained that an IXC has no competitive alternative for access to a particular end-user and, because the IXC pays for access charges and recovers those costs through averaged rates, the end-user has no incentive to avoid high-priced providers for access services.[11] The Commission found that certain competitive LECs used the tariff system to set access rates that were subject neither to negotiation nor to regulation designed to ensure their reasonableness, and then relied on their tariff to demand payment from IXCs for access services that the long distance carriers likely would have declined to purchase at the tariffed rate.[12]

4. To address this market failure, the Commission revised its tariff rules to align tariffed competitive LEC access rates more closely with those of the incumbent LECs.[13] The Commission set a benchmark rate for competitive LEC access rates and concluded that competitive LEC access rates at or below the benchmark would be presumed just and reasonable.[14] Under the rules the Commission adopted, a competitive LEC may not tariff interstate access charges above the higher of (1) the competing incumbent LEC rate, or (2) the benchmark rate or the lowest rate the competitive LEC tariffed for interstate access service within the six months preceding the effective date of the order, whichever is

6 For a more detailed background, *see CLEC Access Reform Order,* 16 FCC Rcd at 9926-30, paras. 8-20.

7 *Id.* at 9931-32, paras. 22-23.

8 *Id.* at 9932-33, para. 24.

9 *See id.* at 9924-25, paras. 2-3. The Commission limited its application of the tariff rules to competitive LEC interstate access services (defined only as interstate switched access services unless otherwise specified to the contrary). *Id.* at 9924, para. 2 & n.2.

10 *Id.* at 9936, para. 32.

11 *Id.* at 9935, para. 31.

12 *Id.* at 9925, para. 2.

13 *See* 47 C.F.R. § 61.26.

14 *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

lower.[15] Competitive LEC access charges above the benchmark (or above the competing incumbent LEC rate, if it is higher) are mandatorily detariffed and may be imposed only pursuant to a negotiated agreement.[16] During the pendency of negotiations, or if the parties cannot agree, the competitive LEC must charge the IXC the appropriate benchmark rate.[17] The Commission also concluded that an IXC would violate section 201(a) of the Act by refusing to complete a call to, or accept a call from, an end-user served by a competitive LEC charging rates at or below the benchmark.[18]

5. In order to avoid too great a disruption for competitive carriers, the Commission implemented the benchmark in a way that allows competitive LEC rates to decrease over time until they reach the rate charged by the competing incumbent LEC.[19] The benchmark was set at 2.5 cents per minute for the first year after the *CLEC Access Reform Order* became effective, and moved to 1.8 and 1.2 cents per minute in the second and third years, respectively.[20] At the end of the third year, the rate will parallel the access rate charged by the competing incumbent LEC.[21] Additionally, the Commission ruled that competitive LECs may tariff the benchmark rate only for service in the Metropolitan Statistical Areas (MSAs) where they were serving customers on June 20, 2001, the effective date of the new rules.[22] In those MSAs where a competitive LEC initiates service after the effective date of the order, it may not tariff a rate higher than the applicable incumbent LEC rate (the "CLEC new markets rule").[23]

6. The Commission also adopted a rural exemption to the benchmark regime. The exemption is available for a competitive LEC that competes with a non-rural incumbent LEC, where no portion of the competitive LEC's service area falls within: (1) any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or (2) an urbanized area, as defined by the Census Bureau.[24] If a competitive LEC originates traffic from or terminates traffic to end-users located within either of these two types of areas, the carrier is ineligible for the rural exemption to the benchmark rule.[25] In recognition of the substantially higher loop costs incurred by competitive LECs in rural areas, competitive LECs qualifying for the rural exemption are permitted to tariff rates up to the highest rate band in the National Exchange Carriers Association (NECA) tariff, minus the NECA tariff's carrier common line (CCL) charge.[26]

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15 47 C.F.R. § 61.26(b).

16 *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

17 *Id.*

18 *Id.* at 9960-61, para. 94.

19 *Id.* at 9944-45, para. 52.

20 47 C.F.R. § 61.26(c).

21 *Id.*

22 *CLEC Access Reform Order*, 16 FCC Rcd at 9947, para. 58.

23 47 C.F.R. § 61.26(d).

24 47 C.F.R. § 61.26(a)(6), (e).

25 *Id. See also CLEC Access Reform Order*, 16 FCC Rcd at 9954, para. 76.

26 47 C.F.R. § 62.26(e).

7. Seven parties petitioned for reconsideration or clarification of the *CLEC Access Reform Order*, and various parties filed oppositions, comments, and replies.[27] The petitioners challenge the validity of the CLEC new markets rule, the structure of the benchmark, and the transition period.[28] Further, the petitioners seek clarification regarding what access rates apply when more than one incumbent LEC operates within the competitive LEC's service area.[29] Another petitioner asks the Commission to clarify that a competitive LEC may charge only the portion of the benchmark rate that reflects the access services actually provided.[30] Several petitioners also challenge various aspects of the rural exemption. These challenges include arguments to expand the scope of the rural exemption, to make the rural benchmark available to competitive LECs entering new areas, and to add the carrier common line (CCL) charge as well as the multi-line business pre-subscribed interexchange carrier charge (PICC) to the rural exemption rate.[31] Finally, certain petitioners request clarification or reconsideration regarding several other issues, including requirements under sections 201(a), 202(a), 203(c), and 214 of the Communications Act.[32]

8. In a Further Notice of Proposed Rulemaking that accompanied the *CLEC Access Reform Order*, the Commission sought additional comment on whether access rates for originating toll-free, or 8YY, traffic should immediately be moved to the competing incumbent LEC rate, rather than following the declining benchmark over three years.[33] As discussed in more detail below, several parties commented on this issue.

9. For the reasons discussed below, we deny petitions for reconsideration of the *CLEC Access Reform Order* but address several issues raised in petitions for clarification. Specifically, we clarify that a competitive LEC is entitled to charge the full benchmark rate if it provides an IXC with access to the competitive LEC's own end-users. We also find that the rate a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions, and we amend our rules in accordance with this finding. We further clarify that any PICC imposed by a competitive LEC qualifying for the rural exemption may be assessed in addition to the rural benchmark rate if and only to the extent that the competing incumbent LEC charges a PICC. In addition, we identify permissible ways in which competitive LECs may structure their rates if they serve a geographic area with more than one incumbent LEC. We also clarify the source of our authority to impose IXC interconnection obligations under

27 *See* Appendix B for a complete list of pleadings filed. Both competitive LECs and IXCs have sought review of the *CLEC Access Reform Order* in the D.C. Circuit. *See AT&T Corp. v. FCC*, Case No. 01-1244 (filed May 31, 2001); *Sprint Corp. v. FCC*, Case No. 01-1263 (filed June 11, 2001); *Mpower Communications Corp. & North County Communications, Inc. v. FCC*, Case No. 01-1280 (filed June 22, 2001). The cases were consolidated and the court is holding the petitions for review in abeyance pending the Commission's completion of this reconsideration proceeding. *See AT&T Corp. v. FCC*, Case Nos. 01-1244, 01-1263, and 01-1280, Order (D.C. Cir. Jan. 8, 2002)(granting the Commission's motion to hold the appeals in abeyance).

28 *See* Focal Petition at 2-6; TDS Petition at 7-9; Time Warner Petition at 2-9.

29 *See* TelePacific Petition at 1-3.

30 *See* Qwest Petition at 2-4.

31 *See* MCLEC Petition at 2-14; RICA Petition at 3-12.

32 *See* Qwest Petition at 4-6; RICA Petition at 12-15; RICA Reply at 8-9.

33 *See CLEC Access Reform Order*, 16 FCC Rcd at 9962-64, paras. 99-104.

section 201(a) and we deny a pending petition for waiver of the CLEC new markets rule. Finally, we decline to set a separate access rate for originating 8YY traffic and allow it to be governed by the same declining benchmark as other competitive LEC interstate access traffic.

III. ORDER ON RECONSIDERATION

A. Accounting for Services Still Provided by the Incumbent LEC

10. Qwest asks the Commission to clarify the rules to ensure that a competitive LEC charges only the portion of the competing incumbent LEC rate that reflects the services that the carrier actually provides.[34] Qwest emphasizes that the competitive LEC's tariffed rate should exclude the amounts paid for access services necessary to connect an IXC to an end-user that are not provided by the competitive LEC.[35] Thus, when one or more of the services necessary to originate or terminate an interexchange call is provided by a carrier other than the competitive LEC, Qwest suggests that the benchmark rate should be correspondingly reduced.[36] For instance, Qwest argues that where the incumbent LEC still provides tandem switching, the IXC should have to pay that charge to the incumbent LEC only, and not to both the incumbent LEC and the competitive LEC.[37]

11. ALTS opposes the requested clarification, arguing that Qwest's characterization of the services Qwest receives and for which it pays is incorrect.[38] According to ALTS, IXCs that exchange traffic with competitive LECs through the incumbent LEC tandem receive a service from both the incumbent LEC and the competitive LEC, and, accordingly, it is appropriate for both the competitive LEC and the incumbent LEC to bill such IXCs.[39] ALTS asserts that an IXC can avoid paying for incumbent LEC services by interconnecting directly with a competitive LEC, thereby bypassing the incumbent LEC network altogether.[40]

12. ASCENT and Focal center their opposition on the administrative burden they allege would result from Qwest's proposed clarification.[41] ASCENT argues that, as a policy matter, the Commission left competitive LECs with maximum flexibility to structure their charges as long as they did not "exceed a benchmark ultimately reflective of incumbent LEC charges," and that removing an

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34 Qwest Petition at 2-4.

35 *Id.* at 2.

36 *Id.* at 3.

37 *Id.*

38 ALTS Comments at 12.

39 *Id. See also* ASCENT Reply at 4-5.

40 ALTS Comments at 12. *See also* Letter from Richard M. Rindler, Counsel for US LEC Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92, filed Aug. 25, 2003 at 5-6 (US LEC Aug. 25 *Ex Parte* Letter).

41 *See, e.g.*, Focal Comments at 7 (asserting that Qwest's request would "vitiate the benchmark as a simple, easy-to-administer guide identifying when CLEC access charges will be presumed reasonable").

access component from competitive LEC rates would be inconsistent with the Commission's intent.[42] Similarly, Focal argues that requiring the change advocated by Qwest "would essentially transform the benchmark from an overall measure of the reasonableness of a CLECs' rates that affords CLECs flexibility in setting rate structures, to a rate and rate structure prescription."[43] Z-Tel interprets Qwest's request as a requirement that competitive LECs mirror incumbent LEC access tariff elements, and it argues that such a requirement would be inappropriate because this may not accurately reflect how a competitive LEC's costs are incurred.[44] Z-Tel further argues that, particularly for UNE-P providers, Qwest's proposal may prevent competitive LECs from recovering their costs. Z-Tel explains that, because the per-minute and per-port components of UNE rates are determined by state commissions, and not necessarily in conjunction with this Commission's review of the same incumbent LEC's interstate tariff, it is possible that the cost of providing a minute of access over the UNE platform could exceed the per-minute interstate access rate for the same incumbent LEC.[45]

13. We deny Qwest's request for clarification that the full benchmark rate is not available in situations when a competitive LEC does not provide the entire connection between the end-user and the IXC. Under section 61.26(b) of the Commission's rules, a competitive LEC's tariffed rate for "its interstate switched exchange access services" cannot exceed the benchmark.[46] Under section 61.26(a)(3), the term interstate switched exchange access services "shall include the functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching."[47] The rate elements identified in section 61.26(a)(3) reflect those services needed to originate or terminate a call to a LEC's end-user. When a competitive LEC originates or terminates traffic to its own end-users, it is providing the functional equivalent of those services, even if the call is routed from the competitive LEC to the IXC through an incumbent LEC tandem. Consequently, because there may be situations when a competitive LEC does not provide the entire connection between the end-user and the IXC, but is nevertheless providing the functional equivalent of the incumbent LEC's interstate exchange access services, we deny Qwest's petition.[48]

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[42] ASCENT Comments at 4. *See also* US LEC Aug. 25 *Ex Parte* Letter at 4, 6 (stating that the Commission's intent was to maintain rate structure flexibility for competitive LECs and to require only that the competing LEC's rate not exceed the benchmark).

[43] Focal Comments at 7.

[44] Z-Tel Opposition at 6.

[45] *Id.* at 6.

[46] 47 C.F.R. § 61.26(b).

[47] 47 C.F.R. § 61.26(a)(3).

[48] IXCs argue that paragraph 55 of the *CLEC Access Reform Order* could be read to suggest that the Commission intended the benchmark to be available only when the competitive LEC provided the full connection between the IXC and the end-user. *See* AT&T Opposition at 19; Letter from Robert J. Aamoth and Jennifer M. Kashatus, Counsel for ITC DeltaCom Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92, at 2 (filed Sept. 11, 2003). We find that this is not the best reading of paragraph 55. When read in conjunction with the definition contained in section 61.26(a)(3), we think the two lists of elements described in paragraph 55 were intended to illustrate what might be (continued....)

14. Although we deny Qwest's petition, we also reject the argument made by some competitive LECs that they should be permitted to charge the full benchmark rate when they provide any component of the interstate switched access services used in connecting an end-user to an IXC.[49] The approach advocated by these competitive LECs, in which rates are not tethered to the provision of particular services, would be an invitation to abuse because it would enable multiple competitive LECs to impose the full benchmark rate on a single call. It also would enable competitive LECs to discriminate among IXCs by providing varying levels of service for the same price.[50] As the Supreme Court clearly has stated, rates "do not exist in isolation. They have meaning only when one knows the services to which they are attached."[51]

15. Through pleadings in this proceeding, as well as a petition for declaratory ruling filed by US LEC,[52] the Commission is aware that there have been a number of disputes regarding the appropriate compensation to be paid by IXCs when a competitive LEC handles interexchange traffic that is not originated or terminated by the competitive LEC's own end-users. Because neither the *CLEC Access Reform Order* nor other applicable precedent addressed the appropriate rate in this scenario, we now conclude that the benchmark rate established in the *CLEC Access Reform Order* is available only when a competitive LEC provides an IXC with access to the competitive LEC's own end-users. As explained above, a competitive LEC that provides access to its own end-users is providing the functional equivalent of the services associated with the rate elements listed in section 61.26(a)(3) and therefore is entitled to the full benchmark rate.

16. Some competitive LECs argue that they should be entitled to collect the full benchmark rate, even when they do not serve the end-user, if they enter into a joint billing arrangement with the carrier that does serve the end-user.[53] We acknowledge that there are situations where a competitive LEC

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considered the "functional equivalent" of incumbent LEC access services, rather than mandating the provision of a particular set of services.

[49] US LEC, for example, argues that a competitive LEC may charge the maximum benchmark rate even where that competitive LEC provides only some portion of the transport component of the switched access service, leaving other carriers to provide the bulk of the service, including (i) the connection between the caller and the local switch, (ii) end office switching, as well as, possibly, (iii) additional tandem-switched transport. *See* Letter from Patrick J. Donovan, Counsel for US LEC Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92 (filed April 29, 2003); *see also* TelePacific Sept. 25 *Ex Parte* Letter at 3 (arguing that the *CLEC Access Reform Order* permits competitive LECs to charge the benchmark rate for the access services they provide to IXCs regardless of the access functions or rate structure).

[50] Although unreasonable discrimination often takes the form of different pricing for the same service, the Supreme Court has made clear that providing different levels of service for the same tariffed price may be equally unreasonable. *See AT&T v. Central Office Telephone*, 524 U.S. 214, 223 (1998) ("An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price.").

[51] *Id.*

[52] *See Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic*, CC Docket No. 01-92, Public Notice, DA 02-2436 (rel. Sept. 30, 2002) (seeking comment on a petition for declaratory ruling filed by US LEC).

[53] *See, e.g.*, White Paper on CMRS/CLEC Intercarrier Compensation, attached to Letter from Kathryn A. Zachem, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92, at 5-6 (filed Jan. 16, 2004) (Verizon Wireless White Paper); Letter from Patrick J. Donovan, Counsel for US LEC Corp., to Marlene H. Dortch, Secretary, Federal Communications
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may bill an IXC on behalf of itself and another carrier for jointly provided access services pursuant to meet point billing methods.[54] We note, however, that the validity of these joint billing arrangements is premised on each carrier that is party to the arrangement billing only what it is entitled to collect from the IXC for the service it provides.[55] In cases where the carrier serving the end-user had no independent right to collect from the IXC, industry billing guidelines do not, and cannot, bestow on a LEC the right to collect charges on behalf of that carrier. For example, the Commission has held that a CMRS carrier is entitled to collect access charges from an IXC only pursuant to a contract with that IXC.[56] If a CMRS carrier has no contract with an IXC, it follows that a competitive LEC has no right to collect access charges for the portion of the service provided by the CMRS provider.[57]

17. Because of the many disputes related to the rates charged by competitive LECs when they act as intermediate carriers, we conclude that it is necessary to adopt a new rule to address these situations. Specifically, we find that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions.[58] We conclude that regulation of these rates is necessary for the all the

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Commission, CC Docket Nos. 96-262 and 01-92, filed Aug. 25, 2003 at 6-7 (stating that US LEC may utilize meet point billing arrangements with the CMRS provider to jointly provision access service to the wireless end-user and that it is entitled to the benchmark rate).

54 *See In the Matter of Access Billing Requirements for Joint Service Provision*, CC Docket No. 87-579, Phase II, Order, 65 Rad. Reg. 2d 650, paras. 2-5 (1988), *applications for review denied,* 4 FCC Rcd 7914 (1989). Indeed, the industry has developed standards, *i.e.*, the Multiple Exchange Carrier Access Billing Standard ("MECAB"), to govern meet point billing arrangements, and the Commission has required LECs to follow the MECAB standards. *See, e.g., In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, CC Docket No. 87-579, Memorandum Opinion and Order, 3 FCC Rcd 13, 16-17, paras. 29-31 (1987) (subsequent history omitted).

55 *See, e.g., In the Matter of Access Billing Requirements for Joint Service Provision*, CC Docket No. 87-579, Phase II, Order, 65 Rad. Reg. 2d 650, para. 87 (1988) ("We therefore conclude that those LECs whose current tariff provisions would allow a LEC to impose [termination] charges if that LEC is an intermediate, non-terminating carrier are required to modify their tariff provisions to preclude such charges in these circumstances.").

56 *See Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192 (2002) (*Sprint/AT&T Declaratory Ruling*), *petitions for review dismissed, AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003).

57 We reject the argument made by Verizon Wireless that the *Sprint/AT&T Declaratory Ruling* does not limit the ability of a CMRS provider to collect access charges from an IXC if the CMRS provider has a contract with an intermediate competitive LEC. *See* Verizon Wireless White Paper at 21. We will not interpret our rules or prior orders in a manner that allows CMRS carriers to do indirectly that which we have held they may not do directly. *See Sprint/AT&T Declaratory Ruling*, 17 FCC Rcd at 13198, para. 12 ("There being no authority under the Commission's rules or a tariff for Sprint PCS unilaterally to impose access charges on AT&T, Sprint PCS is entitled to collect access charges in this case only to the extent that a contract imposes a payment obligation."). Moreover, we also reject the argument by Verizon Wireless that IXCs taking service under certain competitive LEC tariffs are somehow bound by these competitive LEC/CMRS agreements. *See* Verizon Wireless White Paper at 22. Indeed, except in limited circumstances, the Commission's rules specifically prohibit cross-referencing other documents within a tariff. *See* 47 C.F.R. § 61.74(a).

58 We note that competitive LECs continue to have flexibility in determining the access rate elements and rate structure for the elements and services they provide consistent with the *CLEC Access Reform Order*. *See CLEC Access Reform Order*, 16 FCC Rcd at 9946, para. 55. For this reason, we reject concerns expressed by some commenters that this constraint would require competitive LECs to adopt the incumbent LEC rate structure. *See,*
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reasons that we identified in the *CLEC Access Reform Order*. Specifically, as competitive LECs and CMRS providers concede,[59] an IXC may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power. This new rule regarding rates that may be charged when a competitive LEC is an intermediate carrier will apply on a prospective basis.[60]

18. Neither the *CLEC Access Reform Order* nor the *Sprint/AT&T Declaratory Ruling* addressed the appropriate rate a competitive LEC may charge when it is not serving the end-user; therefore, during the time between the effective date of *CLEC Access Reform Order* and the effective date of this reconsideration order, general pricing principles must govern any dispute over the appropriate competitive LEC rate. As a rule, access rates, like all other tariffed rates, must be just and reasonable under section 201(b) of the Act, and access tariffs, like all other tariffs, must clearly identify each of the services offered and the associated rates, terms, and conditions.[61] In this case, the Commission established only a single rate for each year of the transition period and did not state that this rate was available only if a competitive LEC served the end-user on a particular call. Accordingly, prior to this order on reconsideration, it would not have been unreasonable for a competitive LEC to charge the tariffed benchmark rate for traffic to or from end-users of other carriers, provided that the carrier serving the end-user did not also charge the IXC and provided that the competitive LEC's charges were otherwise in compliance with and supported by its tariff.[62]

19. We reject the argument that Qwest's petition provides no basis for any change to the currently effective transitional benchmark rates. In an *ex parte* filing, US LEC argues that Qwest's request for clarification applies only to the final benchmark rates, as distinct from the transitional benchmark rates.[63] US LEC suggests that any clarification must be so limited and may apply only to the final benchmark rates at the competing incumbent LEC rate.[64] We disagree. The language and the arguments made in the petition suggest that Qwest's request is not limited in the manner suggested by US LEC. Although the petition requests that the Commission clarify the meaning of the "competing ILEC rate," it contains several statements that could apply equally to the transitional benchmark rates.[65] The

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e.g., Focal Comments at 6-7; Z-Tel Opposition at 3-6. *See also* US LEC Aug. 25 *Ex Parte* Letter at 2-3 (positing a number of arguments against imposing incumbent LEC rate structures on competitive LECs).

59 *See* Verizon Wireless White Paper at 19 n.58 ("CMRS carriers wield as much 'monopoly power' here as CLECs do in the situations described in the [*CLEC Access Reform Order*].").

60 *See, e.g.*, 5 U.S.C. § 551(4); *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 471-72 (1988).

61 47 U.S.C. § 201(b). *See also* 47 C.F.R. § 61.2(a).

62 *See ITC DeltaCom Communications, Inc. v. US LEC Corp. et al.*, No. 3:02-CV-116-JTC (N.D. Ga. March 15, 2004) (holding that an IXC has no duty to pay a competitive LEC for transiting wireless toll-free calls where the terms of the competitive LEC's tariff cover only access to the competitive LEC's own end-users or transport of traffic that originates or terminates through a LEC switching system).

63 See US LEC Aug. 25 *Ex Parte* Letter at 7.

64 *Id.*

65 For instance, Qwest requests that the competing LEC's "tariffed rate should exclude the amounts paid for access service that are . . . not provided by the competitive LEC." Qwest Petition at 2. In addition, even if Qwest intended its request to apply solely to the final benchmark rates, as US LEC suggests, we believe that clarifying the application of the transitional benchmark rates is a logical outgrowth of Qwest's proposal. *See City of Stoughton v.*
(continued....)

arguments presented by Qwest to support its request are equally applicable to the transitional benchmark rates. Therefore, we find no reason why the Commission is prevented from clarifying the application of the transition benchmark rates or amending its rules prospectively, as set forth above.

20. Finally, we address a request by NewSouth Communications, Inc. that we clarify the meaning of the term "competing ILEC rate" as it applies to a competitive LEC that originates or terminates calls to its end-users after the three-year transition period ends on June 21, 2004.[66] NewSouth argues that a competitive LEC should be permitted to charge for all of the competing incumbent LEC access elements (including tandem switching and end office switching) if its switch serves a geographic area comparable to the competing incumbent LEC's tandem switch.[67] AT&T and MCI oppose NewSouth's request and assert that a competitive LEC may assess access charges on IXCs only for those access services that the competitive LEC actually provides.[68]

21. We agree with NewSouth that clarification of this issue is necessary to avoid litigation and uncertainty, but we decline to adopt NewSouth's proposal. A primary objective of the *CLEC Access Reform Order* is to ensure that competitive LEC access charges are more closely aligned with incumbent LEC access rates.[69] As noted by AT&T and MCI, our long-standing policy with respect to incumbent LECs is that they should charge only for those services that they provide.[70] Under this policy, if an incumbent LEC switch is capable of performing both tandem and end office functions, the applicable switching rate should reflect only the function(s) actually provided to the IXC.[71] We believe that a

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United States EPA, 858 F.2d 747, 751 (D.C. Cir. 1988) (holding that an agency may make changes to a proposed rule if the changes are a logical outgrowth of a proposal and previous comments). In order for a final rule to be a logical outgrowth of a proposal, the agency must have provided proper notice of the initial proposal. *See Sprint Corp. v. FCC*, 315 F.3d at 376. Because Qwest's petition was properly noticed in the context of a rulemaking proceeding, the logical outgrowth analysis may be applied. *See Access Charge Reform*, CC Docket No. 96-262, Public Notice, Report No. 2490 (rel. June 29, 2001), 66 Fed. Reg. 35628 (2001).

66 *See* Letter from Jake E. Jennings, Senior Vice President, Regulatory Affairs and Carrier Relations, NewSouth Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-262, at Attach. (filed Mar. 2, 2004) (attaching Letters from Jake E. Jennings, Senior Vice President, Regulatory Affairs and Carrier Relations, NewSouth Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 1 (filed Feb. 27, 2004).

67 *Id.* at 1-2. NewSouth states that this is the standard that is applied pursuant to our reciprocal compensation rules for purposes of determining whether a competitive LEC may charge the tandem interconnection rate. *See* 47 C.F.R. § 51.711(a)(3).

68 *See* Letter from Peter H. Jacoby, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-262, at 2-4 (filed Mar. 30, 2004) (AT&T Mar. 30 *Ex Parte* Letter); Letter from Henry G. Hultquist, MCI, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-262, at 2-3 (filed Mar. 22, 2004)(MCI Mar. 22 *Ex Parte* Letter). For example, they state that that the functions performed by a competitive LEC switch when it subtends an incumbent LEC tandem are the same as those performed by an incumbent LEC end office, and therefore the competitive LEC should not be permitted to charge for tandem switching. *See* AT&T Mar. 30 *Ex Parte* Letter at 3; MCI Mar. 22 *Ex Parte* Letter at 2.

69 *CLEC Access Charge Order*, 16 FCC Rcd at 9925, para. 3.

70 *See* AT&T Mar. 30 *Ex Parte* Letter at 3 (citing *Bell Atlantic Telephone Companies*, 6 FCC Rcd 4794 (1991)); MCI Mar. 22 *Ex Parte* Letter at 2 (citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556 (1998)).

71 *See, e.g.*, Ameritech Operating Companies, Tariff FCC No. 2, § 6.8.2(D)(4)(c) ("The Tandem Switching rate will not apply to access minutes that originate or terminate at the end office part of a Class 4/5 switch."); Verizon

(continued....)

similar policy should apply to competitive LECs. Accordingly, we clarify that the competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers. Competitive LECs also have, and always had, the ability to charge for common transport when they provide it, including when they subtend an incumbent LEC tandem switch. Competitive LECs that impose such charges should calculate the rate in a manner that reasonably approximates the competing incumbent LEC rate.[72]

B. The CLEC New Markets Rule

1. Modifications to the CLEC New Markets Rule

22. As noted above, under the "CLEC new markets rule," competitive LECs may not tariff a rate higher than the competing incumbent LEC rate in those MSAs where the competitive LEC initiated service after the effective date of the *CLEC Access Reform Order*.[73] Several competitive LECs request reconsideration of this rule so that they may charge the same, declining benchmark rates in new markets that they do in markets served before June 20, 2001.[74] Alternatively, Time Warner requests that competitive LECs be permitted to charge the declining benchmark rates in those markets that they entered within a year of the order's effective date.[75] Focal argues that, at a minimum, the Commission should modify the CLEC new markets rule so that a competitive LEC that has "already invested or signed contracts" in a market could charge the benchmark rate, and would be restricted to the prevailing incumbent LEC rate only where "it had made no investments or had no customers prior to June 20, 2001."[76] Focal further argues that the Commission's adoption of the June 20, 2001 effective date was arbitrary and capricious, because the date does not address the impact on competitive LEC investment and imposes a "flash cut" reduction in rates on those that have already made substantial investment.[77]

23. The competitive LECs argue that they make substantial investments when entering a new market long before they actually turn up the first customer, and that these investments are made in the

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Tariff FCC No. 14, § 4.5.2(H)(2)(f) ("The Tandem Switching rate also will not apply to access minutes that originate or terminate at the end office part of a Class 4/5 switch.").

72 *See* Letter from Jake E. Jennings, Senior Vice President, Regulatory Affairs and Carrier Relations, NewSouth Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92, at 1 (filed May 6, 2004).

73 *CLEC Access Reform Order*, 16 FCC Rcd at 9947, para. 58. *See* 47 C.F.R. § 61.26(d).

74 *See* Focal Petition at 10-11; TDS Petition at 18-19; Time Warner Petition at 2; Focal Reply at 2-3. *See also* Letter from Lawrence Sarjeant, Vice President Regulatory Affairs and General Counsel, United States Telecom Association, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-262 at 2-3 (filed Nov. 20, 2001) (permitting competitive LECs entering new markets to obtain the benchmark rate will promote buildout, which, in turn, will promote the "redundant telecommunications facilities that are essential to ensuring that effective communications are available for homeland security") (USTA Nov. 20 *Ex Parte* Letter).

75 *See* Time Warner Petition at 2, 5-7; *see also* Focal Comments at 2; Focal Reply at 3 n.10.

76 Focal Petition at 10-11. *See also* ALTS Comments at 2 (Commission should rescind rule for carriers that have begun investing or implementing their business plan in a market); Time Warner Comments at 4 (supporting the relief requested by Focal); ASCENT Reply at 8 (supporting the relief requested by Focal and Time Warner).

77 Focal Comments at 4. *See also* Focal Petition at 7-8.

expectation of receiving rates that are sufficient to pay off their investments.[78] As a result, they contend, it causes as much financial disruption to flash-cut to the competing incumbent LEC rate in new markets as it would to make such a change in an existing market.[79] In addition, competitive LECs assert that they develop their strategies, business plans, and product mixes well in advance of market entry, and, accordingly, they need the benefit of the declining, transitional benchmark to adjust their business plans for new markets as well as existing markets.[80] Focal argues that competitive LECs entering new markets will now have to compete not only against incumbent LECs who have substantial advantages with their economies of scope and scale, but also against other competitive LECs that entered the market before the new rules were adopted and therefore are entitled to the higher access rates.[81] ALTS contends that, as a practical matter, many of its members have billing systems that cannot bill separately by MSA, but instead bill on a statewide basis, making it difficult to implement the new markets rule.[82] Z-Tel argues that the new markets rule uniquely affects carriers using the unbundled network element (UNE) platform, because, before the implementation of the rule, their customers' location had no significance; such carriers could market throughout the area of the competing incumbent LEC, without regard to where particular customers were located. Under the new rule, however, a newly acquired customer that is otherwise identical to existing customers will bring a lower access rate if it falls outside of an MSA where the competitive LEC providing service over the UNE platform already provided service.[83] TDS contends that it is irrational to discriminate between carriers that have and have not begun serving customers by a certain date.[84]

24. We decline to change the rule as the petitioners request. In adopting the benchmark system for competitive LEC access charges, the Commission intended to limit the subsidy flowing from IXCs and the long distance market to competitive LECs and their end-users, and to do so with a bright line mechanism that is objective and easy to enforce. The CLEC new markets rule eliminates, as of a specific date, the subsidy flowing from the interexchange market to competitive LECs entering new markets.[85] Modifying the rule as the competitive LECs suggest could substantially increase the amount

78 *See, e.g.*, Focal Petition at 7-8; Time Warner Petition at 6-7.

79 *See* ALTS Comments at 4; ASCENT Comments at 8-9; Focal Comments at 4; Time Warner Comments at 4-5; USTA Nov. 20 *Ex Parte* Letter at 2.

80 *See* Focal Petition at 8-9; TDS Petition at 18-19; Time Warner Petition at 2, 4, 6-7; ALTS Comments at 4-5; ASCENT Comments at 9; Focal Comments at 4; Z-Tel Opposition at 10-11; ASCENT Reply Comments at 8. Time Warner contends that the "critical point" of its petition is that "Time Warner must rely on the same market research and experience when making adjustments to both geographic markets it currently serves and geographic markets Time Warner plans to enter in the future." Time Warner Petition at 5.

81 Focal Petition at 9-10.

82 ALTS Comments at 6. *See also* Joint CLEC May 25 *Ex Parte* at 2-3 (stating that, as currently configured, competitive LEC billing systems are incapable of billing different rates on an MSA-specific basis).

83 Z-Tel Opposition at 10.

84 TDS Petition at 18. *See also* ASCENT Reply at 10.

85 AT&T Opposition at 7. AT&T argues that artificial subsidies to increase a customer base will only increase the "disruption" and "dislocation" that ultimately results from inefficient competitive LEC entry. *Id. See also* WorldCom Opposition at 2.

by which IXCs subsidize competitors in the local-service market and would create ongoing incentives for economically inefficient entry in new markets.[86]

25. We also decline to modify the rules so that a competitive LEC may tariff the benchmark rate in markets that it had merely planned to enter, but where it was not actually serving customers, before the effective date of our rules. Given the numerous different competitive LEC business plans and market entry strategies, we can conceive of no reliable, objective means of determining whether a competitive LEC has made sufficient investment in a particular market to justify tariffing the benchmark rate, nor have competitive LEC commenters suggested one.[87] In addition to continuing the subsidy flow to competitive LEC operations, the rule that the competitive LECs request would be susceptible to abuse, and difficult and time-consuming for this Commission to enforce.

26. Further, we are not persuaded by claims that the new markets rule is technically difficult to implement due to competitive LEC billing system limitations. The competitive LECs contend that their access billing systems make it to impossible to comply with the new markets rule because access billing software is designed to bill on a statewide basis, rather than on an MSA basis.[88] The petitions filed by RICA and MCLEC suggest otherwise, however. These commenters argue that tariffing different access rates for different areas is not a significant burden.[89] Although the new markets rule may require some changes to current competitive LEC billing systems, RICA maintains that the changes required to track access by customer location for billing purposes "would not be significant."[90] To the extent that such changes are necessary, competitive LECs serving new markets in a state can assess whether changes to the billing system are worth the investment during the transition period to the competing incumbent LEC rate. Alternatively, the competitive LEC could determine that it is more cost-effective to move all access customers within a state to a rate at or below the incumbent LEC rate prior to expiration of the transition period.[91] Thus, we are not convinced that the new markets rule is impossible to implement, as some parties contend.[92]

27. The Commission strives to provide regulatory certainty, but changes to the regulatory landscape are as inevitable as other changes to the marketplace, and businesses are ultimately responsible

86 *See* AT&T Opposition at 9-10.

87 Accordingly, we agree with commenters suggesting that Focal's proposal of allowing higher rates where the competitive LEC had made investments or signed customers is "amorphous" and "unworkable." *See, e.g.*, AT&T Opposition at 10.

88 *See* ALTS Comments at 6; Z-Tel Comments at 10. *See also* Joint CLEC May 25 *Ex Parte* at 2-3 (attaching the declarations of several competitive LECs describing billing system limitations).

89 *See* MCLEC Petition at 7; RICA Petition at 10-11. MCLEC further observes that section 61.26(b) already establishes a high probability that competitive LECs will have more than one access rate since that rule permits them to charge the higher of two different access rates that are likely to vary between areas. MCLEC Petition at 7 (discussing 47 C.F.R. § 61.26(b)).

90 RICA Petition at 11.

91 For this reason, we are not convinced that the purported inability to bill on an MSA-basis prevents a competitive LEC from serving any particular market. *See* Z-Tel Petition for Waiver at 9. Indeed, nothing precludes a competitive LEC from implementing a uniform set of access rates at or below the level of the competing incumbent LEC rate.

92 *See* ALTS Comments at 6; Joint CLEC May 25 *Ex Parte* at 2-3.

for adjusting their business plans to take account of such changes.[93] There was no reason for competitive LECs to make investment decisions on the assumption that the status quo would remain unchanged, given the concerns expressed by the Commission about competitive LEC rates and the possible need to constrain those rates.[94] The Commission had signaled as early as the *Fifth Report and Order* on access reform that it believed that competitive LEC access rates were excessive in some instances, and competitive LECs had no reasonable expectation of being able, indefinitely, to charge higher rates than carriers with whom they compete.[95] Indeed, the Commission expressly sought comment on whether incumbent LEC access rates should serve as a benchmark to evaluate the reasonableness of competitive LEC access charges.[96]

28. Moreover, we find that allegations of competitive harm resulting from the CLEC new markets rule do not undermine the reasons for adopting the rule. Z-Tel argues that the new markets rule uniquely affects carriers using the unbundled network element (UNE) platform because the rule "ignores the statewide nature of UNE Platform market entry."[97] TDS contends that it is irrational to discriminate between carriers that have and have not begun serving customers by a certain date.[98] Focal argues that it will be at a competitive disadvantage when it enters a new market because it will face competition from incumbent LECs with historical advantages and from competitive LECs that are permitted to charge the higher, benchmark rate.[99]

29. As an initial matter, at the conclusion of the transition period, all competitive LECs will be subject to a benchmark rate equal to the competing incumbent LEC rate.[100] To the extent that a competitive LEC enters a new market during the transition period, it may charge the same access rates as its primary competitor, *i.e.*, the incumbent LEC. In setting the benchmark level, the Commission sought to "mimic the actions of a competitive marketplace, in which new entrants typically price their product at or below the level of the incumbent provider."[101] As to competition among competitive LECs (UNE

93 *See* Sprint Opposition at 4-5 (arguing that, since 1997, competitive LECs were on notice that attempts to charge access rates that exceeded incumbent LEC access rates may be subject to regulatory action). *See also* AT&T Opposition at 7-8.

94 *See In the Matter of Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14340, 14344, paras. 238, 247 (1999) (subsequent history omitted) (*Access Charge Further Notice*). The Commission observed that it may have "overestimated the ability of the marketplace to constrain CLEC access rates. In particular, IXCs allege that a substantial number of CLECs impose switched access charges that are significantly higher than those charged by the incumbent LECs with which they compete, suggesting that the Commission may need to revisit the issue of CLEC access rates." *Id.* at 14340, para. 238.

95 *Id.* at 14340, para. 238.

96 *Id.* at 14344, para. 247.

97 Z-Tel Opposition at 10.

98 TDS Petition at 18. *See also* ASCENT Reply at 10.

99 Focal Petition at 9-10.

100 *See* 47 U.S.C. § 61.26(c)(establishing declining benchmark rates over a three-year transition period ending June 21, 2004). *See also supra* para. 5 (discussing the declining benchmark rates).

101 *CLEC Access Reform Order*, 16 FCC Rcd at 9941, para. 45.

platform providers or otherwise) in a particular market during the transition period, the CLEC new markets rule appropriately distinguishes between those competitive LECs that serve end-users and those that do not. The Commission's rules assure that the former are provided a transition period to adjust existing customer relationships; no such transition is needed for carriers that have no customers. We believe that the benefits of limiting application of the transition to a competitive LEC's existing markets outweigh any potential competitive harm resulting from the CLEC new markets rule.

30. Finally, some commenters request clarification that the rural exemption rate is available for competitive LECs entering new MSAs.[102] That is, the new market rule does not apply if the competitive LEC would otherwise qualify for the rural exemption.[103] We agree that this is the correct interpretation of the Commission's order. The rural exemption rate is a substitute for the incumbent LEC rate that would otherwise be used as the benchmark rate. In adopting the rural exemption, the Commission recognized that rural competitive LECs experience higher costs, particularly loop costs, and may lack the lower cost urban operations that non-rural incumbent LECs use to subsidize rural operations.[104] Thus, it is appropriate that the rural exemption apply when a competitive LEC enters a new MSA. Based on our clarification here, we amend rule 61.26 (e) accordingly to read "Notwithstanding paragraphs (b) through (d) of this section…."[105]

2. APA Compliance

31. ALTS and Focal argue that the Commission violated the Administrative Procedure Act (APA) because it did not provide notice that it was considering a different rule for new markets and did not provide any opportunity for parties to comment on it.[106] We disagree. The Commission specifically sought comment on the competing incumbent LEC rate as a benchmark.[107] In the *Further Notice of Proposed Rulemaking* immediately preceding the *CLEC Access Reform Order,* the Commission reminded interested parties that the Commission had "invited parties to address whether the incumbent LEC's terminating access charges should serve as a benchmark to evaluate the reasonableness of CLEC's terminating rates,"[108] and repeated its request for comment on this proposal. The Commission also reiterated that it was still considering a rule "that a CLEC's terminating access charges might be presumptively just and reasonable if they were less than or equal to the terminating access charges of the

102 *See* 47 C.F.R. § 61.26(d), (e).

103 *See* MCLEC Petition at 11-13; RICA Petition at 11-12.

104 *See CLEC Access Reform Order*, 16 FCC Rcd at 9950, para. 66.

105 *See* Appendix A for final rules. This clarification requires us to note a typographical error in subsection (e) of 47 C.F.R. § 61.26 as printed. We note that the text of subsection (e), as released, referenced "paragraphs (b) through (c)" not "paragraphs (b) through (3)," which is the text found in the C.F.R. *See CLEC Access Reform Order*, 16 FCC Rcd at App. B. Due to an transcription error, the reference to subsection (c) in the final rules incorrectly appears in the C.F.R. as subsection (3). Because we amend rule 61.26 herein, the error is now moot.

106 ALTS Comments at 2-3; Focal Petition at 2-6. *See also* Joint CLEC May 25 *Ex Parte* at 3-5 (arguing that adoption of the CLEC new markets rule constitutes a violation of the APA in that the Commission did not provide adequate notice and comment).

107 *Access Charge Further Notice*, 14 FCC Rcd at 14344-45, paras. 247-48.

108 *Id.* at 14344, para. 247 (citing *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry, 11 FCC Rcd 21354, 21476, para. 280 (1996)).

incumbent LEC with which the CLEC competes."[109] Several commenters supported this proposal, arguing that the Commission should immediately set competitive LEC tariffed rates at or near the incumbent LEC rate.[110] The Commission also asked whether these proposals should apply to originating access rates, as well as whether the benchmark "should vary depending on various criteria," and, if so, "what criteria" the Commission should consider in determining the applicable benchmark.[111]

32. As the record indicates, it should have been apparent to any interested party that the Commission was contemplating a benchmark at the competing incumbent LEC rate for at least some markets. That the Commission ultimately decided to adopt a transition mechanism for some parties does not in any way render the notice provided to parties defective.[112] The request for comments on incumbent LEC-based and other benchmarks was sufficient to "adequately frame the subjects for discussion,"[113] providing affected parties a fair opportunity to express their views. Thus, ALTS and Focal could have anticipated that the new markets rule might be adopted based on proposals to set competitive LEC tariffed rates immediately at the incumbent LEC rate,[114] and thus could have commented meaningfully on it.[115]

C. Rural Exemption

33. As explained above, the rural exemption to the benchmark scheme is available for a competitive LEC competing with a non-rural incumbent LEC.[116] The exemption is not available, however, if any portion of the competitive LEC's service area falls within a non-rural area.[117] Qualifying

[109] *Id.*

[110] *CLEC Access Reform Order,* 16 FCC Rcd at 9937, para. 36 and n. 87 (citing comments of Sprint, AT&T, and WorldCom supporting use of competing incumbent LEC rate as benchmark).

[111] *Access Charge Further Notice,* 14 FCC Rcd at 14345, para. 248.

[112] *See, e.g., Buckeye Cablevision, Inc. v. FCC,* 387 F.2d 220, 226-28 (D.C. Cir. 1967) (holding that failure by the Commission to mention "grandfather rights" in a Notice of Inquiry is not a fatal defect under the APA).

[113] *Connecticut Light & Power Co..v. Nuclear Regulatory Commn.*, 673 F.2d 525, 533 (D.C. Cir.), *cert. denied,* 459 U.S. 835 (1982).

[114] *See* AT&T Opposition at 7-8; Sprint Opposition at 4.

[115] *See, e.g., Small Refiner Lead Phase – Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 548-49 (D.C. Cir. 1983) (holding that, in determining whether adequate notice was given, the court will consider whether a party "should have anticipated that a requirement might be imposed"). Accordingly, competitive LECs received adequate notice that this was a possibility. *See American Medical Ass'n v. United States,* 887 F.2d 760, 766-69 (7th Cir. 1989) (notice of final IRS rule providing three methods of allocating revenues sufficient where proposed rule enumerated seven factors to be considered in allocating revenues, as the final rule was "contained" in the proposed version and merely eliminated some of the alternative calculation methods).

[116] *See* 47 C.F.R. § 61.26(e).

[117] 47 C.F.R. § 61.26(a)(6) (defining a non-rural area as any incorporated place of 50,000 inhabitants or more, based on the most recently available populations statistics of the Census Bureau or any urbanized area, as defined by the Census Bureau). We note that SouthEast Telephone, Inc. (SouthEast) recently requested a waiver of section 61.26(a)(6) of the Commission's rules to permit it to serve customers in metropolitan locations and maintain its eligibility for the rural exemption. *See Pleading Cycle Established For Petition of SouthEast Telephone, Inc. for Waiver of CLEC Access Charge Rules*, CC Docket No. 96-262, Public Notice, DA 04-936 (rel. April 2, 2004). Our decision here is made without prejudice to SouthEast's waiver request. That petition will be addressed (continued....)

competitive LECs may tariff rates up to the highest NECA rate band minus the NECA tariff's CCL charge if the competing incumbent LEC is subject to CALLS access rates.[118] Petitioners challenge all of these aspects of the exemption. That is, they seek to broaden the applicability of the exemption to competitive LECs competing with any price cap LEC and to competitive LECs serving non-rural areas to the extent they serve rural end-users. They also request that the Commission incorporate the CCL in the rural exemption rate, and seek clarification on the application of the multi-line business PICC. As explained in more detail below, we decline to make any of these changes to the rural exemption, and we clarify the application of the PICC under the rural exemption.

1. Status of Competing Carrier

34. Commenters argue that the rural exemption should apply to competitive LECs that serve an otherwise qualifying rural area, if they compete with *any price cap LEC*, rather than, as it is currently structured, applying only to competitive LECs competing with non-rural incumbent LECs.[119] The petitioners argue that many price cap LECs, although they may qualify as rural, still have substantial, relatively dense population areas with which to subsidize the more diffuse, rural portions of their service areas.[120] Consequently, they argue, it is unfair to tie a rural competitive LEC's access rates to those of a rural price cap LEC that serves relatively dense population areas and has economies of scale not available to rural competitive LECs.[121] This requested rule change would enable those competitive LECs competing with rural price cap LECs to charge NECA rates rather than the CALLS access rates applicable to their price cap LEC competitors.

35. We decline to expand the rural exemption as requested. The rural exemption was intended to prevent rural competitive LECs with high loop costs from being tied to a competing incumbent's access rate that reflects the incumbent's ability to subsidize high-cost, rural operations with

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separately under the Commission's well-established waiver standards. *See Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

118 47 C.F.R. § 61.26(e). During the course of the debate over competitive LEC access charges, the Commission adopted an integrated interstate access reform and universal service proposal put forth by the members of the Coalition for Affordable Local and Long Distance Service (CALLS). *See In the Matter of Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (*CALLS Order*), *aff'd in part, rev'd in part, and remanded in part, Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Order on Remand, FCC 03-164 (rel. July 10, 2003) (providing further analysis and explanation of the Commission's decision in the *CALLS Order*). The *CALLS Order* resolved major outstanding issues concerning access charges of price cap incumbent LECs by determining the appropriate level of interstate access charges and by converting implicit subsidies in interstate access charges into explicit, portable, and sufficient universal service support. *Id.* at 12974-76. The *CALLS Order* is interim in nature, covering a five-year period, beginning in July of 2000. *Id.* at 12977.

119 *See* RICA Petition at 7-8; RICA Reply at 1-4; *see also* MCLEC Petition at 9-10; MCLEC Reply at 4-5. MCLEC further notes that the definitions of rural competitive LEC and rural telephone companies do not line up properly, noting that a rural competitive LEC competing with a rural incumbent LEC can still face a competitor with substantially greater resources and economies of scale. MCLEC Reply at 4.

120 See MCLEC Petition at 9-11; RICA Petition at 8. RICA contends that rural price cap incumbent LECs, as mid-sized companies serving third and fourth tier cities, still experience economies of scale not available to the rural competitive LECs. RICA Petition at 8.

121 *See* MCLEC Petition at 10; RICA Petition at 8.

more concentrated, low-cost urban operations.[122] The Commission also sought, however, to keep the exemption as narrow as possible to minimize the strain it placed on the interexchange market. We agree that IXCs and their customers should not subsidize entry of rural competitive LECs that are unable to compete by charging lower prices or persuading end-users to pay higher rates.[123] Moreover, the petitioners seeking to expand the rural exemption make only generalized assertions about the ability of rural price cap carriers to subsidize their high cost operations without providing specific evidence on the question. Indeed, at least one price cap incumbent LEC challenges the underlying assumptions of the petitioners, noting that it has no urban areas to subsidize its rural areas and has a very diffuse service area.[124] AT&T concurs, arguing that rural incumbent LECs do not have the same ability as non-rural incumbent LECs to subsidize their access rates in rural areas by averaging their access rates across state-wide study areas that include lower cost urban and suburban areas. [125] There is inadequate evidence in the record that rate-averaging by rural price cap incumbent LECs creates a sufficient subsidy flowing to the higher cost portions of the incumbent LEC service areas to justify such an expansion of the rural exemption.

2. Location of Competitive LEC End-Users

36. Rural competitive LECs also contend that the rural exemption should apply to the extent that end-users are located in rural areas, arguing that a single end-user in a non-rural area should not entirely disqualify a competitive LEC from charging the NECA rate.[126] They state that the presence of some non-rural customers does not change the higher loop costs that rural competitive LECs continue to face in serving their rural end-users.[127] They also assert that the rule's current structure will increase litigation and administration costs because, for the IXCs, so much rides on finding even a single competitive LEC end-user that is located in a non-rural area.[128] ALTS argues that, without such an expansion, the exemption is virtually worthless because, according to ALTS, almost no competitive LECs serve exclusively rural areas.[129]

37. We decline to broaden the application of the rural exemption in this manner. The exemption was designed as a narrow exception to the otherwise market-based rule that ties competitive LEC rates to those of their incumbent competitors in the access market. In adopting the rural exemption, the Commission emphasized the need for administrative simplicity, and noted that it would apply only to a small number of carriers serving a small portion of the nation's access lines.[130] Accordingly, we agree

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122 *CLEC Access Reform Order*, 16 FCC Rcd at 9949-50, para. 64.

123 *See* Sprint Opposition at 7-8; *see also* WorldCom Opposition at 3.

124 Iowa Telecom Opposition at 2, 5-8. Alternatively, Iowa Telecom argues that it should be permitted to charge the NECA rates. Iowa Telecom Opposition at 9.

125 AT&T Opposition at 11.

126 MCLEC Petition at 3-4; RICA Petition at 10-11; ALTS Comments at 10; MCLEC Reply at 1-3.

127 MCLEC Petition at 3-4; ALTS Comments at 10; MCLEC Reply at 2.

128 MCLEC Petition at 5-7.

129 ALTS Comments at 10.

130 *See CLEC Access Reform Order*, 16 FCC Rcd at 9951, 9954, paras. 68, 75.

with IXCs that this rule change would improperly broaden the application of the rural exemption.[131] The purpose of the exemption was to encourage competitive entry in truly rural markets. If a competitive LEC chooses to serve more concentrated, non-rural areas, in order to offset the cost of serving high-cost, rural customers, it should not also receive the subsidy of charging NECA rates for access to its rural end-users.

3. Exclusion of CCL Charge

38. Rural competitive LECs also request that we reverse the portion of the rural exemption rule that excludes the CCL charge from the NECA rate that they may charge if the competing incumbent LEC is subject to CALLS access charges.[132] They contend that their costs, particularly loop costs, are significantly higher than those of the price cap LECs with which they typically compete, and that they should therefore be permitted to charge the CCL portion of the NECA rate.[133] RICA emphasizes that the Commission's *MAG Order*[134] has resulted in a significant reduction in interstate access revenue for rural

[131] *See* AT&T Opposition at 12 ("If a rural CLEC can also go outside its rural area and sign up customers in lower cost urban and suburban areas, it too can average its cost of serving high-cost rural areas with the lower cost of serving urban and suburban areas, and there is no need for the rural exemption."); Sprint Opposition at 8 ("There is no reason to let a CLEC have the best of both worlds: competing in urban areas against an ILEC whose urban retail rates and access charges are affected by its rural operations, while being allowed to charge above-ILEC access charges in the rural portions of the ILEC's territory.") *See also* WorldCom Opposition at 3 ("The Commission's goal should be to contract, not expand, the number of end-users for which CLECs may impose access rates higher than those of their primary competitor, the ILEC. ... Moreover, if the CLEC overwhelmingly serves customers in rural areas, it can seek waiver of the Commission's rules.").

[132] *See* MCLEC Petition at 13-14; RICA Petition at 5-7. Historically, incumbent LECs have recovered the interstate portion of common line costs through two separate charges -- the subscriber line charge (SLC), a flat-rated charge imposed on end-users, and the carrier common line charge (CCLC), a per-minute charge imposed on IXCs. In the 1997 *Access Charge First Report and Order*, the Commission required price cap LECs to recover a portion of these costs through a new presubscribed interexchange carrier charge (PICC), a flat-rated charge assessed on an end-user's presubscribed IXC. *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982 (1997) (subsequent history omitted). In 2000, the Commission adopted the *CALLS Order*, an integrated access charge and universal service reform plan for price cap carriers, one feature of which was to raise SLC caps over time so as to phase out the PICC and CCLC and require price cap LECs to recover the majority of interstate common line costs from their end-users. *See generally CALLS Order*, 15 FCC Rcd 12962. In 2001, the Commission adopted an access charge and universal service reform plan for rate-of-return carriers. *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, CC Docket No. 98-77, *Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 98-166, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613 (2001) (*MAG Order*). As part of these reforms, the Commission raised SLC caps to the levels set for price cap carriers, eliminated CCL charges as of July 1, 2003, and replaced any resulting common line revenue shortfall with explicit universal service support. *Id.* Thus rate-of-return LECs recover all of their interstate common line costs through a combination of end-user charges and universal service; they recover none from IXCs.

[133] *See* MCLEC Petition at 13; RICA Petition at 3-5; RICA Reply at 6.

[134] *MAG Order*, 16 FCC Rcd at 19613.

competitive LECs charging the NECA rate, without having the same impact on NECA pool members.[135] MCLEC notes that, although rural competitive LECs can impose multi-line business PICCs, this does not make up for the lost revenue because rural areas have many fewer multi-line businesses than do the areas served by most CALLS incumbent LECs.[136]

39. We decline to revise the rule to allow rural-exemption competitive LECs to charge the CCL portion of the NECA rate.[137] Excluding the NECA tariff's CCL charge when the competitive LEC competes with a CALLS incumbent LEC promotes parity between the competing carriers. The CCL charge, the SLC, and the PICC have been designed to recover common line costs from different sources; the CCL charge from IXCs, the SLC from end-users, and the PICC from multi-line businesses. Most incumbent LECs no longer collect CCL charges.[138] As the Commission previously explained, competitive LECs competing with CALLS incumbent LECs are free to build into their end-user rates a component equivalent to the incumbent LEC's SLC, as well as to assess IXCs a multi-line business PICC.[139] The competitive LEC should not be permitted to double recover common line costs by mirroring the incumbent LEC's SLC and PICC charges and also charging the NECA tariff's CCL charge to IXCs.[140]

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[135] *See* Letter from David Cosson, Counsel for RICA, to Marlene Dortch, Secretary, Office of the Secretary, Federal Communications Commission, CC Docket No. 96-262, at 10 (Jan. 30, 2003). RICA explains that the MAG order reduced the NECA rates by shifting recovery to end-users and to a new universal service support mechanism. *Id.*

[136] MCLEC Petition at 13-14.

[137] We note that, in accordance with the *MAG Order*, the CCL charge was eliminated for rate-of-return carriers as of July 1, 2003, thereby rendering this issue moot on a going forward basis. *See MAG Order*, 16 FCC Rcd at 19642, para. 61 (eliminating the CCL charge when SLC caps are scheduled to reach their maximum levels and the new universal service support mechanism, Interstate Common Line Support (ICLS), is implemented). We amend section 61.26(e) to remove any reference to the CCL. Similarly, we remove any reference to the transport interconnection charge, which also was eliminated. *Id.* at 19656-58, paras. 98-104.

[138]. *CLEC Access Reform Order*, 16 FCC Rcd at 9956, para. 81 (explaining that the price cap LECs' CCL charges have been largely eliminated). Price cap LECs make up the CCL revenue by charging higher SLCs and the multi-line business PICC. According to information submitted in the 2003 annual filing, only four price cap LECs continue to collect CCL charges and these charges account for only .01 of one percent of the total common line revenues for the industry. Rate-of-return LECs make up the CCL revenue by charging higher SLCs and through the ICLS.

[139] *Id.*

[140] RICA argues that if the NECA rate drops because cost recovery is shifted to the Universal Service Fund, competitive LECs will need appropriate protection of their revenues. RICA suggests benchmarking the rural competitive LEC rate to the NECA rate plus "the average per minute or per line recovery shifted to the USF" or, alternatively, making rural competitive LECs eligible for USF on the same basis as rural incumbent LECs, rather than on the basis of the incumbent LEC with which the competitive LEC competes. RICA Petition at 9. In establishing a benchmark rate, our intent was more closely to align competitive LEC access rates with those of incumbent LECs. *See CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3. Thus, our *CLEC Access Reform Order* addressed only those charges assessed by incumbent LECs and competitive LECs on IXCs. The Commission's methodology for calculating high-cost universal service support for different eligible telecommunications carriers serving the same areas is being reexamined in a separate proceeding now before the Federal-State Joint Board on Universal Service. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 17 FCC Rcd 22642 (2002); Public Notice, 18 FCC Rcd 1941, 68 FR 10429 (rel. Mar. 5, 2003).

4. Application of PICC

40. RICA asks us to clarify whether PICCs may be tariffed in addition to the rural exemption rate.[141] RICA argues that the *CLEC Access Reform Order* could be interpreted as defining the rural exemption rate as the NECA rate, minus CCL charge, plus some component to account for the multi-line business PICC.[142] Stated differently, RICA seeks clarification as to whether a competitive LEC may impose the multi-line PICC on top of the rural exemption rate.[143] RICA also requests that we clarify whether PICCs may be tariffed when the competing incumbent LEC does not have a PICC.[144] Sprint believes that, under the *CLEC Access Reform Order*, the composite access rate charged by a competitive LEC, including any PICC, may not exceed the rural exemption rate.[145] Thus, Sprint argues that competitive LECs may not assess a multi-line PICC on top of the applicable rural exemption rate, but may assess a PICC as part of the charges that make-up the composite rate.[146]

41. As the Commission stated in its *CLEC Access Reform Order*, rural competitive LECs competing with CALLS incumbent LECs are free to assess IXCs a multi-line PICC charge.[147] Indeed, as discussed above, the ability of rural competitive LECs to assess a multi-line business PICC obviated, in part, the need for a CCL charge because the PICC provided a potential revenue source.[148] The question presented by RICA is whether the PICC, if assessed, must be included in the calculation of the rural exemption rate or whether the PICC may be assessed in addition to the rural exemption rate. We clarify that a PICC may be imposed by a rural competitive LEC in addition to the rural exemption rate if and only to the extent that the competing incumbent LEC assesses a PICC, and we revise section 61.26(e) of the Commission's rules accordingly.[149]

D. Structure of the Benchmark

42. TDS requests that we modify the benchmark scheme to allow competitive LECs to charge higher access rates in lower density markets. TDS argues that UNE loop prices vary dramatically with density zone, and that the benchmark rate should recognize that carriers serving tier 2 and 3 markets have greater loop expenses because of lower customer density, just as the rural exemption recognizes for

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141 RICA Petition at 15-16.

142 RICA notes that subsection (e) of the rule suggests exclusion of the multi-line business PICC, and requests clarification regarding the rule. RICA Petition at 15-16. Section (e) of the rule provides that "a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching and the transport interconnection charge." 47 C.F.R. § 61.26(e).

143 Sprint Opposition at 9.

144 RICA Petition at 15.

145 Sprint Opposition at 9-10.

146 *Id.*

147 *Access Charge Reform Order*, 16 FCC Rcd at 9956, para. 81.

148 *Id.*

149 *See* Appendix A.

rural carriers.[150] TDS further argues that the order fails to take into account the different cost structure of incumbent LECs, their economies of scale, and their protected monopoly status during which they developed much of their customer base.[151]

43. Under TDS's proposal, two sets of access rates, above the 2.5-cent benchmark but below the rural exemption rate, would be available for competitive LECs serving areas of lower density that have already been so identified for such purposes as UNE or access pricing.[152] In support of this proposal, TDS also argues that the CALLS plan resulted in negotiated access rates and revenue flows that do not necessarily coincide with CALLS carrier statewide or individual market costs.[153] TDS contends that, as long as access charge averaging prevails, the largest incumbent LECs cannot charge rates that reflect differences in cost between their urban core markets and their Tier 2 and 3 and residential market segments.[154] TDS seeks a disaggregation of the averaged incumbent LEC benchmark and of a comparable NECA rate to what it contends more closely resembles the rate differentials that a "truly market-driven system would bring about."[155]

44. We decline to adopt this modification to the benchmark system. Instead, we will maintain the current structure of benchmark, which ties the rates of non-rural competitive LECs to the higher of the 2.5-cent benchmark or the rate of the competing incumbent LEC rate. The logic of TDS's multi-tier benchmark system – allowing higher access rates for areas of progressively lower density – may be consistent with the logic of the rural exemption; however, the rural exemption was designed as a limited exception to an otherwise broadly applicable rule that would drive competitive LEC access rates to those of the competing incumbents. As stated earlier, in adopting the rural exemption, the Commission emphasized the need for administrative simplicity, and noted that it would apply only to a small number of carriers serving a small portion of the nation's access lines.[156] We believe that adoption of TDS's proposal would not meet the need for simplicity and narrow application.

45. Additionally, the proxies for density that TDS suggests would be ill-suited to the job. In some cases, access pricing zones are no longer tied to density and may be changed at will by an incumbent's tariff filing.[157] UNE pricing zones are not uniformly implemented across the states and,

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150 TDS Petition at 7-9, 13-15.

151 *Id.* at 11. TDS also contends that it is discriminatory to treat competitive LECs serving smaller markets the same as those competitive LECs that serve national markets and have substantially greater economies of scale and resources. *Id.*

152 TDS Petition at 8-9. TDS first set out this multi-tiered benchmark proposal in its last set of reply comments in the rulemaking. Because of an apparent glitch in the computer docketing system, however, bureau staff did not include these comments in the rulemaking. Based on this failure, TDS seeks reconsideration of the benchmark system. TDS Petition at 6-9. TDS also requested a stay of the *CLEC Access Reform Order* until at least such time as the Commission has issued a decision on the merits in response to its petition for reconsideration. *See* TDS Petition for Stay at iii. Inasmuch as we deny TDS's petition for reconsideration of the *CLEC Access Reform Order*, the petition for stay is denied as moot.

153 TDS Petition at 11; TDS Reply at 5.

154 TDS Reply at 5.

155 *Id.*

156 *See CLEC Access Reform Order*, 16 FCC Rcd at 9951, 9954, paras. 68, 75.

157 *See* 47 C.F.R. § 69.727.

depending on population patterns and state implementation, a particular zone may cover areas of dramatically different density in two states. Finally, the arguments made by TDS rely on the assumption that there has been some regulated determination of competitive LEC costs, including separations and cost allocation, that conclusively establishes that the access costs of competitive LECs are higher than the rates set by the Commission, which is not the case.[158] For these reasons, we reject TDS's proposal to change the existing benchmark structure.

E. Multiple Incumbent LECs in a Service Area

46. TelePacific requests that the Commission clarify what access rate applies when more than one incumbent LEC operates within a competitive LEC's service area.[159] TelePacific notes that, as competitive LECs enter new markets (and as the transitional benchmark declines), they may have to set their access rate at the "competing [incumbent] LEC rate" when there are multiple such rates.[160] TelePacific requests that the Commission prescribe precisely how the "competing [incumbent] LEC rate" should be calculated for those cases when a competitive LEC serves areas covered by two incumbents with differing rates, asserting that it is overly burdensome for competitive LECs to charge different rates for access to end-users falling in different incumbent LEC territories.[161] TelePacific suggests various means of setting this competing incumbent LEC rate,[162] and it argues that, without such clarification, competitive LEC market entry will be delayed or possibly abandoned altogether because of uncertainty about rates and the prospect of IXC refusal to pay, or litigation.[163]

47. By moving competing LEC access rates to the competing incumbent LEC rate, the Commission intended for competitive LECs "to receive revenues equivalent to those the ILECs receive from IXCs."[164] The Commission's rules define the "competing ILEC" as the local exchange carrier "that would provide interstate exchange access service to a particular end user if that end user were not served by the CLEC."[165] Thus, as AT&T correctly observes, there is only one "competing ILEC" and one "competing ILEC rate" for each particular end-user.[166] Accordingly, competitive LECs serving an area with multiple incumbent LECs can qualify for the safe harbor by charging different rates for access to

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158 AT&T notes that TDS has offered no actual cost data to support its assertion that its costs are above the amount it can recover through access charges. AT&T Opposition at 15.

159 TelePacific Petition at 1-3. *See also* ALTS Comments at 6-9 (supporting TelePacific request for clarification); Time Warner Comments at 2-3.

160 TelePacific Petition at 4.

161 TelePacific Petition at 2-3, 5-6; TelePacific Revised Reply at 2-3.

162 TelePacific suggests three ways the Commission could set this rate: (1) simple average of the incumbent LEC rates from the competitive LEC's service area; (2) weighted average based on the number of end-user lines in each of the incumbent LEC territories within the competitive LEC's service area; or (3) weighted average based on the relative traffic volumes statewide. TelePacific Petition at 7-9. *See also* Time Warner Comments at 3; ALTS Comments at 7-8 (advocating use of a straight average approach).

163 TelePacific Revised Reply Comments at 4-5. *See also* ALTS Comments at 7.

164 *CLEC Access Reform Order*, 16 FCC Rcd at 9945, para. 54.

165 47 C.F.R. § 61.26(a)(2).

166 *See* AT&T Opposition at 16.

particular end-users based on the access rate that would have been charged by the incumbent LEC in whose service area that particular end-user resides.[167]

48. The record suggests, however, that some competitive LECs may prefer to charge IXCs a blended access rate when more than one incumbent LEC operates within a competitive LEC's service area.[168] One alternative for competitive LECs is to negotiate a blended access rate with the IXCs. If a competitive LEC charges a blended access rate other than a negotiated rate, such a rate must reasonably approximate the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers. That is, a blended rate is reasonable if it does not result in revenues that exceed those the competing incumbent LECs would receive from IXCs for access to those customers. Although we decline to specify the precise manner in which a competitive LEC must set its access rates when it serves the area of multiple incumbent LECs,[169] we believe that a weighted average calculation based on the number of minutes of use generated by a competitive LEC's end-user customers in different incumbent LEC territories is consistent with this standard.[170] In such cases, the competitive LEC bears the burden of demonstrating that its blended rate approximates the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers.

F. Billing Name Information

49. Qwest contends that an IXC's duty under section 201(a) to accept competitive LEC access traffic should exist only when the competitive LEC provides adequate billing name and address (BNA) information, so that the IXC can properly bill the competitive LEC end-user for the calls made.[171] Qwest argues that, in the absence of adequate BNA information, the IXC should be permitted to refuse to accept (or pay for) competitive LEC access service, because without such information, the IXC cannot collect for the traffic it carries.[172]

50. We decline to condition the IXCs' section 201(a) duty to accept competitive LEC access services on the provision of BNA information that the IXC deems sufficient. The Commission considered the issue of LEC obligations to provide BNA information in the context of an extensive rulemaking proceeding, and determined that, in some cases, LECs are required to provide billing information under tariff.[173] If IXCs believe that the current rules do not provide for adequate BNA

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[167] *See id.*

[168] For instance, TelePacific states that its billing systems do not identify the competing incumbent LEC relevant to an end-user's access traffic and that developing such a billing system would be costly and difficult. *See* TelePacific Petition at 5-6.

[169] Dictating precisely how a competitive LEC must calculate the competing incumbent LEC rate when it serves more than one incumbent LEC area will involve the Commission unnecessarily in the details of competitive LEC rates when, as we stated in the *CLEC Access Reform Order*, we are trying to minimize our regulation of them. *CLEC Access Reform Order*, 16 FCC Rcd at 9939, para. 41.

[170] *See* AT&T Opposition at 17.

[171] Qwest Petition at 4-6.

[172] *Id. See also* AT&T Opposition at 19-20 (agreeing that an IXC must be able to decline to accept competitive LEC access traffic if the competitive LEC fails to provide sufficient BNA information).

[173] *See In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Second Report and Order, 6 FCC Rcd 4478 (1993); *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing* (continued....)

information or if IXCs continue to have difficulty obtaining BNA information from competitive LECs, they can seek appropriate relief from the Commission.[174] Moreover, the competitive LECs persuasively argue that Qwest's proposal would encourage IXCs to find inadequacies with competitive LECs' BNA information in order to avoid accepting (and paying for) access service.[175] This could create a loophole in the 201(a) obligation that the Commission imposed and would thereby again endanger the ubiquity of the network, a consideration that substantially animated the *CLEC Access Reform Order.*

G. Other Matters

1. RICA Claims Regarding AT&T Discontinuance of Service.

51. RICA requests a determination regarding whether an IXC's withdrawal from certain service areas or refusal of service to certain carriers' end-users amounts to a violation of section 214.[176] In the *CLEC Access Reform Order*, the Commission concluded that it need not address the applicability of section 214 because it would be a violation of section 201(a) for an IXC to refuse service to a competitive LEC end-user where the competitive LEC has tariffed access rates within the safe harbor.[177] RICA contends that, by not resolving the section 214 issue, the Commission failed to address whether past refusals of AT&T to continue providing service without authority from the Commission violated the Act.[178] RICA also requests enforcement of section 203(c), which requires carriers to comply with their tariffs.[179] RICA contends that AT&T violated its own tariffs by refusing to serve end-users even where access to arrangements were available to them.[180]

52. We decline to address in this order whether past refusals of AT&T to continue providing service without authority from the Commission violate section 214 and section 203(c) of the Act. Whether the prior actions of AT&T violated the Act depends on fact-specific findings that are more

(Continued from previous page)
Information for Joint Use Calling Cards, Petitions for Waiver of Rules Adopted in the BNA Order, CC Docket No. 95-115, Second Order on Reconsideration, 8 FCC Rcd 8798 (1993) (subsequent history omitted); *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Third Order on Reconsideration, 11 FCC Rcd 6835, 6856, para. 38 (1996) (clarifying that LECs are required to provide BNA information associated with calling card, third party, and collect calls) (subsequent history omitted).

174 IXCs could seek this relief via a petition for rulemaking or on a case-by-case basis. *See* ALTS Comments at 13 (suggesting that the appropriate remedy for the IXC would be to file a section 208 complaint and seek redress from the Commission on a case-by-case basis).

175 ALTS, ASCENT, and Z-Tel raise the concern that giving IXCs the option of rejecting competitive LEC access service invites abuse, by creating a danger of unilateral action by IXCs displeased with competitive LEC actions. ALTS Comments at 13-14; ASCENT Comments at 6; Z-Tel Opposition at 7-8; ASCENT Reply at 6-7.

176 RICA Petition at 12-13 (citing RICA, Request for Emergency Temporary Relief Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision, Feb. 18, 2000, at 12). *See also* RICA Reply at 8-9.

177 *CLEC Access Reform Order*, 16 FCC Rcd at 9961, paras. 96-97.

178 RICA Petition at 12-13.

179 *Id.* at 13. *See also* 47 U.S.C. § 203(c).

180 RICA Petition at 12-13.

appropriately handled in the context of an enforcement proceeding.[181] Indeed, RICA appears to acknowledge this in its petition by stating that "enforcement action is...required."[182] To the extent that RICA believes it has been harmed by AT&T's prior actions, it may seek a remedy via our complaint process or the courts.

2. Section 202(a) and 203(c) Violations

53. RICA requests clarification whether competitive LECs that file access tariffs and then also negotiate different rates with certain IXCs violate sections 202(a) or 203(c).[183] RICA contends that these provisions of the Act "historically have been applied to require that a carrier cannot agree to charge a customer at other than its filed tariff rate and that charging different rates to similarly situated customers is unlawful."[184] According to RICA, it appears that, under the *CLEC Access Reform Order*, competitive LECs may charge and enforce tariff rates, but nevertheless negotiate a different rate or regulation with some access customers without violating these Act provisions.[185] RICA also requests a statement that the Commission will not impose forfeitures for violation of these sections in this situation.[186] AT&T argues that there is no need for clarification that competitive LECs can provide access services to IXCs pursuant to intercarrier agreements subject to section 211 of the Act instead of tariffs.[187] Sprint responds that this type of discrimination claim must be decided on a case-by-case basis, and that without a factual record, the Commission cannot opine on this.[188]

54. We deny RICA's request. In this case, we agree with Sprint that any claims in this context concerning violations of section 202(a) or section 203(c) should be decided on a case-by-case basis because such claims depend on fact-specific circumstances. Section 202(a) of the Act makes it unlawful "for any common carrier to make any unjust or unreasonable discrimination in charges, practices, ...facilities, or services, ... or to make or give any undue or unreasonable preference or advantage to any particular person."[189] Section 203(c) specifies that carriers must apply the rates and

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181 RICA asks the Commission to conclude that AT&T's refusal to serve competitive LEC customers also violates section 201(b), section 202(a), and possibly section 254(g) of the Act. *See* Letter from Clifford C. Rhode, Counsel for RICA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-262 (filed July 18, 2002) (attaching Letter from David Cosson, Attorney for Rural Independent Competitive Alliance to Jeffrey Dygert, Deputy Division Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, CC Docket No. 96-262 at 3-4 (filed July 18, 2002)). We decline to address whether past refusals of AT&T to continue providing service violates these sections as well because whether the prior actions of AT&T violated these sections of the Act also depends on fact-specific findings that are more appropriately handled in the context of an enforcement proceeding.

182 RICA Petition at 13.

183 *See id.* at 13-15. *See also* RICA Reply at 6-8.

184 RICA Petition at 13-14.

185 *Id.* at 14. *See also* RICA Reply Comments at 8.

186 RICA Petition at 13-14.

187 AT&T Opposition at 13 n. 17. Section 211 of the Act requires carriers to file intercarrier contracts or agreements with the Commission. 47 U.S.C. § 211.

188 Sprint Opposition at 9.

189 47 U.S.C. §202(a).

regulations set forth in their tariffs.[190] In order to determine whether a carrier's conduct violates these provisions of the Act, the Commission must consider certain facts. For instance, in determining whether a carrier is in violation of section 202(a), the Commission applies a three-pronged test, which includes a consideration of whether the services at issue are "like" services.[191] In each case, the Commission should evaluate the unique circumstances and make a determination based on the factual record.

55. RICA responds that, even if more facts are necessary to determine violations under section 202, no such specifics are necessary under section 203, which provides an "absolute command."[192] As an initial matter we note that section 203 does not contain an absolute command, as RICA contends. Section 203 begins by stating that "[n]o carrier, *unless otherwise provided by or under authority of this Act*, shall engage or participate in such communication unless schedules have been filed and published."[193] In the *CLEC Access Reform Order*, the Commission provided, pursuant to its authority under the Act, that competitive LECs may obtain higher rates through negotiation.[194] Further, we can imagine no situation where an IXC would voluntarily negotiate a higher rate for an access service identical to that offered pursuant to tariff. We continue to believe, and there is nothing in the record to the contrary, that an IXC paying a rate in excess of the benchmark likely will receive additional features beyond the tariffed service.[195]

3. Negotiation Requirement

56. TDS complains that the Commission failed to provide a backstop for a competitive LEC in a higher cost market to demonstrate that its costs exceed the incumbent LEC's average charges for the competitive LEC's portion of the incumbent LEC service area.[196] TDS urges the Commission to modify its order to require IXCs to negotiate or submit to arbitration to set cost-based rates in density zones where incumbent LEC UNE and transport charges are already deaveraged because of density-based cost differentials.[197] TDS also urges the Commission to permit competitive LECs to charge higher tariffed rates if they can demonstrate that their costs exceed those of the incumbent LEC.[198] Sprint opposes the arbitration request, arguing that above-benchmark rates, in the absence of an IXC's agreement to pay them, "are simply impermissible" under the rules.[199] Sprint further argues that the competitive LEC

190 *Id.* §203(c).

191 *See, e.g., MCI Telecommunications Corp. v. FCC,* 917 F.2d 30, 39 (D.C. Cir. 1990); *Allnet Communications Serv., Inc. v. US West, Inc.* 8 FCC Rcd 3017, 3025, para. 38 n. 87 (1993).

192 RICA Reply at 8.

193 47 U.S.C. § 201(c) (emphasis added).

194 *See CLEC Access Reform Order*, 16 FCC Rcd at 9940, para. 43.

195 *See id.* at 9937, para. 37.

196 TDS Petition at 17.

197 *Id.*

198 *Id.*

199 Sprint Opposition at 10-11.

remains able to pass along costs to its end-user customers, and those customers will discipline the market by making their carrier selections accordingly.[200]

57. We reject TDS's requests that we impose a negotiation or arbitration requirement on IXCs and permit competitive LECs to tariff rates above the benchmark if cost-justified. Both of TDS's requests assume incorrectly that the Commission adopted a cost-based approach to competitive LEC access charges in its *CLEC Access Reform Order*.[201] The Commission explicitly declined to apply this sort of regulation to competitive LECs[202] and explained that it was applying a market-based approach.[203] Consistent with this finding, the Commission held that it will assess the reasonableness of competitive LEC access rates by evaluating market factors rather than a particular carrier's costs.[204] The requests by TDS would involve an examination of carrier costs rather than market data to determine competitive LEC access rates. Because such an examination would be contrary to the Commission's market-based approach to competitive LEC access charges, we must reject TDS's requests.

58. Further, contrary to TDS's assertion, the Commission did acknowledge a remedy in the form of end-user charges for competitive LECs that incur higher costs. In the *CLEC Access Reform Order*, the Commission concluded that competitive LEC access service rates above the benchmark should be mandatorily detariffed, which requires competitive LECs to negotiate higher prices with IXCs.[205] If the parties cannot agree, the Commission stated that "the CLEC must charge the IXC the appropriate benchmark rate."[206] The Commission further noted that competitive LECs remain free to recover from their end-users any higher costs that they incur in providing access service.[207] Thus, under the *CLEC Access Reform Order*, the "backstop" for a competitive LEC in a higher cost market is to charge the benchmark rate and recover any additional costs from its end-users. The Commission reasoned that, when a competitive LEC attempts to recover additional amounts from its end-user, the customer receives the correct price signals, which results in market discipline.[208] TDS fails to demonstrate that this rationale is flawed or that this "backstop" is insufficient to cover any costs in excess of the benchmark.

200 *Id.* at 11.

201 *See* AT&T Opposition at 14-15.

202 *See CLEC Access Reform Order*, 16 FCC Rcd at 9939, para. 41. In particular, we found that a new entrant in a competitive market would not be able to charge a higher rate than the incumbent for the same service. *Id.* at 9937, para. 37.

203 *Id.* at 9941, para. 45 (stating that, in setting the benchmark rate, "we seek, to the extent possible, to mimic the actions of a competitive marketplace").

204 *AT&T v. BTI*, 16 FCC Rcd at 12321-22, paras. 17-21.

205 *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

206 *Id. See also id.* at 9956, para. 82.

207 *Id.* at 9938, para. 39.

208 *Id.*

4. Interconnection Obligations and Section 201

59. In the *CLEC Access Reform Order*, the Commission determined that section 201(a) of the Act places certain limitations on an IXC's ability to refuse competitive LEC access service.[209] Specifically, the Commission concluded that "an IXC that refuses to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area, would violate section 201(a)."[210] The Commission reasoned that, because a competitive LEC's access rates are presumed reasonable if they fall at or below the benchmark, a request by a competitive LEC's end-user is a "reasonable request" for service under section 201(a) if the competitive LEC charges rates at or below the benchmark.[211] Thus, in determining limitations on an IXC's ability to refuse service under section 201(a), the Commission focused on the first clause of section 201(a), which requires common carriers to furnish communication service upon reasonable request therefor.[212]

60. In discussing limitations on an IXC's ability to refuse service under 201(a), the Commission also referenced the second clause of section 201(a), which empowers the Commission, after a hearing and determination of the public interest, to order common carriers to establish physical connections with other carriers, and to establish through routes and charges for certain communications.[213] The Commission did not, however, explicitly rely on this portion of section 201(a) in imposing limitations on an IXC's ability to refuse service. The Commission now finds it necessary to clarify its intent to rely on the second clause of section 201(a) to support such limitations.[214]

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209 *CLEC Access Reform Order*, 16 FCC Rcd at 9960, para. 92. *See* 47 U.S.C. § 201(a). Section 201(a) of the Act states that it is "the duty of every common carrier engaged in interstate or foreign communication ... to furnish such communication service upon reasonable request therefor." *Id.* It further requires that common carriers establish physical connections with other carriers where, after the opportunity for a hearing, the Commission has found such action "necessary or desirable in the public interest." *Id.*

210 *CLEC Access Reform Order*, 16 FCC Rcd at 9961, para. 94.

211 *Id.*

212 *Id.*

213 *Id.* at 9960, para. 92 (discussing 47 U.S.C. § 201(a)).

214 On June 14, 2002, the Court of Appeals for the D.C. Circuit vacated a declaratory ruling by the Commission concerning an IXC's obligation to purchase access service from a competitive LEC when an end-user has requested that it provide interexchange service through the competitive LEC. *See AT&T Corp. v. FCC*, 292 F.3d 808, 812-13 (D.C. Cir. 2002), *vacating AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues*, CCB/CPD No. 01-02, Declaratory Ruling, 16 FCC Rcd 19158 (2001) (*AT&T Declaratory Ruling*). In that declaratory ruling, the Commission found that the first clause of section 201(a) imposes a duty on common carriers to accept reasonable requests for service, and that the request to complete a call using a competitive LEC access service that is tariffed at presumptively reasonable rates satisfies this requirement. *AT&T Declaratory Ruling*, 16 FCC Rcd at 19263-64. AT&T filed a petition for review of this ruling, challenging the Commission's reliance on the first clause of section 201(a) of the Act, and the court granted AT&T's petition. Specifically, the court rejected the notion that a competitive LEC's demand to an IXC for a physical connection or a through route is a request by the competitive LEC's customer for such service under the first clause of section 201(a). *AT&T v. FCC*, 292 F.3d at 812. According to the court, "if the FCC wants to compel AT&T to establish a through route with another carrier, then the FCC must follow the procedures specified in the second clause of [section] 201(a)." *Id.* We now expressly rely on the second clause of 201(a) to support Commission-imposed limitations on an IXC's ability to refuse competitive LEC access service.

61. The second clause of 201(a) provides that the Commission may compel a common carrier to establish a physical connection or a through route after opportunity for hearing if it finds such action necessary or desirable in the public interest.[215] After notice and comment, the Commission found that a limitation on an IXC's ability to refuse service was necessary and desirable in the public interest.[216] In the *CLEC Access Reform Order,* the Commission concluded that a limitation on an IXC's ability to refuse service was necessary in order to protect universal connectivity and universal service – two important policy goals that our rules are designed to promote.[217] The Commission reasoned that "any solution to the current problem that allows IXCs unilaterally and without restriction to refuse to terminate calls or indiscriminately to pick and choose which traffic they will deliver would result in substantial confusion for consumers, would fundamentally disrupt the workings of the public switched telephone network, and would harm universal service."[218] Accordingly, we conclude that our rulemaking procedures combined with our public interest finding in the *CLEC Access Reform Order* support a decision to require an IXC to establish a physical connection or a through route via the acceptance of access service if such service is provided at rates that are just and reasonable in accordance with the Act.[219] In the *CLEC Access Reform Order*, the Commission found that competitive LEC access rates at or below the benchmark are presumptively reasonable.[220] Therefore, we find that an IXC's refusal to accept competitive LEC access service at rates at or below the benchmark would run afoul of the second clause of section 201(a). This obligation may be enforced through a section 208 complaint before the Commission.[221]

5. Z-Tel Petition for Waiver of Section 61.26(d)

62. On August 3, 2001, Z-Tel filed a Petition for Temporary Waiver of Commission Rule 61.26(d), the CLEC new markets rule, as applied to certain MSAs that Z-Tel was capable of serving as of

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215 47 U.S.C. § 201(a).

216 Although section 201(a) requires an opportunity for hearing, our previous use of notice and comment procedures to satisfy the section 201 hearing requirement was expressly confirmed by the U.S. Court of Appeals for the Third Circuit. *See Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1265 (3rd Cir. 1974) (holding that section 201(a) permits procedures less formal and adversarial than an evidentiary hearing because, among other things, courts have come to favor rulemaking over adjudication for the formulation of new policy), *cert. denied*, 422 U.S. 1026 (1974). In the *Access Charge Further Notice*, the Commission explicitly sought comment on an IXC's obligations to accept or deliver traffic from or to a LEC and "whether any statutory or regulatory constraints prevent an IXC from declining a CLEC's access service." *Access Charge Further Notice*, 14 FCC Rcd at 14341-42, paras. 241-42. In response to the *Access Charge Further Notice*, numerous parties commented on whether section 201(a) requires IXCs to accept access traffic. *See CLEC Access Reform Order*, 16 FCC Rcd at 9959, para. 91 (discussing the comments filed on this issue). Thus, the notice and comment procedures were satisfied in this case.

217 *CLEC Access Reform Order*, 16 FCC Rcd at 9960, para 93 (explaining that "the public has come to value and expect the ubiquity of the nation's telecommunications network").

218 *Id.*

219 47 U.S.C. § 201(b).

220 *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

221 47 U.S.C. § 208(a).

the petition date.[222] Z-Tel requests that the rule be waived for three years to permit it to offer exchange access services in the specified MSAs pursuant to its filed interstate access tariff.[223] Z-Tel argues that the public interest would be served if it were allowed to offer this service without requiring it to implement the costly software upgrades that it asserts would be necessary to enable Z-Tel to charge different access rates on an MSA basis.[224]

63. The arguments made by Z-Tel in support of its waiver request are identical to those raised in petitions seeking reconsideration of the CLEC new markets rule, and several parties urge the Commission to grant the relief sought by Z-Tel on an industry-wide basis, as requested in petitions for reconsideration.[225] For example, other competitive LECs argue that it is technically difficult and expensive to comply with the CLEC new markets rule because existing billing systems must be modified to comply with section 61.26(d).[226] Because the arguments made by Z-Tel and other parties in support of a waiver are identical to those considered and rejected here, we deny the petition for waiver.[227] We also deny the petition for the separate reason that Z-Tel failed to demonstrate any special circumstances necessary to support a waiver of the Commission's rules.[228] The fact that other parties have expressed similar industry-wide concerns in the context of the rulemaking proceeding suggests that Z-Tel's circumstances are not unique or special in any respect.[229] For all these reasons, we deny Z-Tel's petition.

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[222] *See generally* Z-Tel Waiver Petition. The petition was docketed and comments were filed on November 2, 2001. *See Z-Tel Files Petition for Waiver of Commission Rule 61.26(d) Pertaining to CLEC Access Services*, CCB/CPD File No. 01-19, Public Notice, 16 FCC Rcd 18652 (2001). A number of parties filed comments, oppositions, and reply comments. *See* Appendix C for a complete list of pleadings in this docket.

[223] *See* Z-Tel Waiver Petition at 12. Throughout its petition, Z-Tel sometimes refers to "Commission Rule 61.29(d)," rather than 61.26(d). *See, e.g., id.* at 6. Because there is no rule 61.29(d), we assume that Z-Tel intended to reference 61.26(d) throughout its petition.

[224] Z-Tel needed the software upgrade in order to charge the transitional benchmark rate in its existing markets and the competing incumbent LEC rate in its new markets. *Id.* at 8.

[225] *See* ASCENT Waiver Gomments at 5; Focal/Pac-West Waiver Comments at 4; ALTS Waiver Reply at 1-2. *See also* ASCENT Waiver Comments at 4 (stating that "[t]he precise issue raised by Z-Tel is presently before the Commission, having been raised by more than one party within the context of reconsideration petitions'); Sprint Waiver Reply at 2 (arguing that Z-Tel's request is a "petition for reconsideration masquerading as a waiver request").

[226] *See* Focal/Pac-West Waiver Comments at 3; ALTS Waiver Reply at 3. We note that, at the time the petition for waiver was filed, Z-Tel estimated that the software modifications and upgrades would be available in mid-2002. *Id.* at 8-9. Given the amount of time that has passed since the petition was filed, we suspect that Z-Tel's request may be moot in any event.

[227] *See supra* discussion section III.B (considering and rejecting arguments to reconsider the CLEC new markets rule).

[228] *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (holding that "a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest"). *See also Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970) (indicating the need for articulation of special circumstances beyond those considered during a regular rulemaking).

[229] *See* ACSENT Waiver Comments at 3 (noting that the dilemma faced by Z-Tel will be faced by numerous competitive LECs).

IV. EIGHTH REPORT AND ORDER

A. Background

64. In the further notice of proposed rulemaking issued with the *CLEC Access Reform Order*, the Commission raised various questions relating to 8YY traffic originating on competitive LEC networks.[230] The Commission sought this information because AT&T had asserted that abuses surrounding competitive LEC-originated 8YY traffic justified immediately capping the access rate for this category of traffic at the rate of the competing incumbent LEC.[231] In particular, AT&T asserted that certain competitive LECs seek out customers that generate high volumes of 8YY traffic and share access revenues with these customers through agreements that provide for payments to the end-user based on the level of 8YY traffic it generates.[232]

65. The Commission requested information about the proportion of competitive LEC originating access traffic that is composed of originating 8YY service and the proportion of competitive LEC end-users that have the type of revenue-sharing agreements that AT&T described.[233] The Commission inquired whether the abuses relating to 8YY traffic that AT&T alleged should be addressed through a general rulemaking, or whether they should be left to the Commission's complaint process.[234] It asked whether competitive LECs noticed different 8YY traffic patterns depending on whether customers had entered revenue-sharing agreements, and it also asked if the access rate for originating 8YY traffic should depend on whether a competitive LEC actually offered revenue-sharing agreements to its customers.[235] The Commission also inquired whether the permitted access charge for a particular competitive LEC's originating 8YY traffic should depend on what other services it provided to its end-users.[236]

66. In response to the *Further Notice,* certain IXCs assert that the Commission would be justified in immediately capping access rates for competitive LEC 8YY traffic at the level of the competing incumbent LEC. According to these IXCs, when access rates are higher, competitive LECs enter into revenue-sharing arrangements that create incentives for the generation of 8YY traffic, which, in turn, imposes additional costs on IXCs and their 8YY subscribers and leads to network blockages that interfere with legitimate 8YY traffic.[237] They assert that competitive LECs often engage in commission schemes with large generators of 8YY traffic (hotels, airports, and college campuses), refunding to those

[230] *See CLEC Access Reform Order*, 16 FCC Rcd at 9961-64, paras. 99-104. The following discussion of issues raised in the further notice assumes that the competitive LEC originates the 8YY traffic from an end-user customer of the competitive LEC. Competitive LEC arrangements to provide access to IXCs with other carriers raise different issues that we address in section III.A.

[231] *Id.* at 9961-62, para. 98.

[232] *Id.*

[233] *Id.* at 9962-63, para. 100.

[234] *Id.* at 9962, para. 99.

[235] *Id.* at 9963, paras. 101-102.

[236] *Id.* at 9963, para. 103.

[237] *See, e.g.*, AT&T 8YY Comments at 8-9; Sprint 8YY Comments at 7-8; WorldCom 8YY Comments at 1-3. A complete list of comments and replies is contained in Appendix D.

end-users a portion of the access revenues resulting from this type of traffic.[238] The IXCs contend that this creates the incentive for fraudulent generation of 8YY minutes as a way for end-users to create income for themselves.[239] They argue that captive IXC access customers are forced to bear the competitive LEC's cost of providing a financial incentive for institutional users to take the competitive LEC's service.[240]

67. Other commenters, including competitive LECs, maintain that there is no need to immediately cap access rates for competitive LEC 8YY traffic because the opportunity and incentive for fraudulent generation of 8YY traffic is overstated. Most commenters deny that, as a general matter, revenue-sharing arrangements motivate competitive LEC customers to generate inflated amounts of 8YY traffic.[241] They explain that the benefits of the arrangements do not accrue to the party placing the 8YY calls because a substantial portion of the traffic coming from a large 8YY generator consists of callers dialing around the institution's pre-subscribed interexchange carrier to reach a different long distance provider. For instance, an association of telecommunications professionals in higher education asserts that, on a daily basis, many university students reach the toll provider of their choice through toll-free access numbers.[242] The competitive LECs argue that the same is likely true of callers from hotels.[243] According to the competitive LECs, the calling patterns of students and hotel guests would not be affected by any revenue-sharing arrangement with the university or hotel. They further argue that the rare instances of abuse would be more appropriately dealt with through the Commission's complaint process.[244]

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238 AT&T 8YY Comments at 3; Sprint 8YY Comments at 6.

239 AT&T 8YY Comments at 8; WorldCom 8YY Comments at 2-3. AT&T asserts that on an industry-wide basis, it has been billed over $57 million in excess 8YY access charges, and that even the lower benchmark rates still have enough cushion to make this profitable for competitive LECs. AT&T 8YY Comments at 6. AT&T argues that these commission structures prevent IXCs or incumbent LECs from competing with the competitive LEC for the special access business that would previously have carried 8YY traffic from large generators. *Id.* at 6-7. AT&T contends that customers have financial incentive to inflate their number of 8YY calls because there is no cost and the commissions actually pay them for making the calls. *Id.* at 8. According to AT&T, commissions impose additional costs on all carriers – IXCs must increase their network capacity to handle the fraudulent calls; increased traffic reduces service quality for legitimate 8YY users; and 8YY subscribers must increase their answering capacity to receive calls that are not legitimate. *Id.* at 9.

240 *See* AT&T 8YY Comments at 6-7; Sprint 8YY Reply at 3-4.

241 *See* ACUTA 8YY Comments at 2-3; Focal/US LEC 8YY Comments at 3-4; Time Warner 8YY Comments at 4; TelePacific 8YY Comments at 6; ASCENT 8YY Reply at 3; Focal/US LEC 8YY Reply at 5; Time Warner 8YY Reply at 6. Many commenters also defend revenue-sharing arrangements as legal and legitimate. *See* ALTS 8YY Comments at 3-4; Focal/US LEC 8YY Comments at 5-8; TelePacific 8YY Comments at 5-6; Time Warner 8YY Comments at 3-4.

242 ACUTA 8YY Comments at 2-3 (indicating that, at one member university, approximately 50% of student callers dial around the university's pre-subscribed interexchange carrier, usually using toll-free access numbers).

243 Time Warner 8YY Comments at 5-6 (stating that callers likely are paying at least as much to place their call through a pre-paid or other calling card provider as they would be if they were simply using the pre-subscribed provider of their choice from their home phone).

244 *See* ASCENT 8YY Comments at 5; Focal/US LEC 8YY Comments at 4; MCLEC 8YY Comments at 3; ASCENT 8YY Reply at 2-3; Focal/US 8YY Reply at 14; Time Warner 8YY Reply at 7.

68. AT&T also maintains that competitive LEC access service for outbound 8YY traffic is distinct from other originating access service.[245] According to AT&T, the competitive LECs incur lower costs when they transport 8YY traffic via dedicated facilities.[246] In the case of high-capacity dedicated facilities, AT&T argues that the originating access function is already paid for by the competitive LEC's customer.[247] Further, AT&T argues that the connection between the competitive LEC's local switch and IXC point of presence is the incumbent LEC tandem, and IXCs are billed separately by the incumbent LEC for tandem access and transport charges.[248] Thus, AT&T argues that the appropriate benchmark for competitive LEC access services for outbound 8YY traffic carried over dedicated local access facilities is the incumbent LEC's local end office switching charge.[249] The competitive LECs dispute the rationale offered to support a lower benchmark rate and contend that they provide the functionality necessary to impose the full incumbent LEC switched access rate.[250]

B. Discussion

69. For the reasons explained below, we conclude that it is not necessary immediately to cap competitive LEC access rates for 8YY traffic at the rate of the competing incumbent LEC.[251] Rather, we will permit competitive LECs to continue to charge the previously established, declining benchmark rate to which other competitive LEC access traffic is subject.

70. As the IXCs contend, some competitive LECs may have agreed to share with some customers generating a high volume of 8YY traffic a portion of the access revenues that it receives in connection with the traffic.[252] We are not persuaded, however, that the existence of these arrangements

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245 AT&T 8YY Comments at 9-10.

246 AT&T 8YY Comments at 10; AT&T 8YY Reply at 14. AT&T maintains that, where outbound 8YY traffic is carried over dedicated high-capacity facilities for customers that aggregate large volumes of 8YY traffic, the dedicated connection is generally leased by the competitive LEC to the customer. AT&T 8YY Comments at 10; AT&T 8YY Reply at 15.

247 AT&T 8YY Comments at 10; AT&T 8YY Reply at 15.

248 AT&T 8YY Comments at 10; AT&T 8YY Reply at 15.

249 AT&T 8YY Comments at 10; AT&T 8YY Reply at 15.

250 *See* Focal/US 8YY Reply at 7-10 (disputing that competitive LECs recover the costs of dedicated facilities from high volume customers and that competitive LEC's do not provide tandem switching functionality). *See also* Time Warner 8YY Reply at 7 (stating that it performs the same network functionalities and uses the same technical configuration when it provides service to large generators of 8YY traffic as it uses when providing switched access to other high capacity end-users).

251 Because we find that IXC allegations of wide-spread fraud or abuse may indeed be overstated, we also reject AT&T's request that we limit 8YY database query charges based on the incumbent LEC charges. *See* AT&T 8YY Reply at 15 n.22.

252 *See, e.g.*, TelePacific 8YY Comments at 6 (admitting that it and other competitive LECs may offer commissions to aggregators for 8YY traffic routed over their networks). *See also* Focal/US LEC 8YY Comments at 5-6 (stating that revenue sharing arrangements are commonplace in all markets characterized by competition and are quite prevalent in the telecommunications industry).

necessarily leads to the problems that the IXC commenters attribute to them.[253] Specifically, we are not convinced that the commission arrangements that competitive LECs may have entered into with 8YY generators necessarily affect the level of traffic that these customers, typically universities and hotels, generate. The IXCs have failed to demonstrate that commission payments to 8YY generators such as universities or hotels translate effectively into incentives for the individuals who actually use those facilities to place excessive or fraudulent 8YY calls. The commission payments challenged by the IXCs go to the hotel or university itself, not to the students or hotel guests who place the bulk of the 8YY calls from these institutions.[254] Accordingly, it does not appear that these commissions create any incentive for those actually placing the calls artificially to inflate their 8YY traffic.[255] Rather, as the competitive LECs contend, the primary effect of the commission payments appears to be to create a financial incentive for the institutions to switch from the incumbent to a competitive service provider.[256]

71. Furthermore, even if we were persuaded that there was an incentive for 8YY traffic generation, the fact that competitive LEC access rates are now subject to the declining benchmark should eliminate any harm to IXCs from this traffic. As the competitive LECs point out, moving access rates for 8YY traffic to the benchmark rates already denies them much of the revenue with which they might otherwise pay commissions to 8YY generators.[257] Accordingly, we question whether this practice has continued to a significant extent.[258] Moreover, because access rates for 8YY traffic must be at or below the benchmark, inflated minutes of 8YY traffic would appear to benefit rather than burden IXCs. To the extent that IXCs in the future identify what appear to be illegitimate levels of 8YY traffic coming from a particular end-user, they can continue to address these situations on a case-by-case basis, as they have done in the past.[259]

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253 For instance, ALTS notes that a competitive LEC business plan based on some commission is not necessarily less legitimate than one without, citing, as an example, a commission-paying competitive LEC simply willing to have a lower profit margin. ALTS 8YY Comments at 4.

254 *See* ACUTA 8YY Comments at 2; Focal/US LEC 8YY Comments at 3-4; Time Warner 8YY Comments at 4; Focal/US LEC 8YY Reply at 12.

255 ACUTA 8YY Comments at 2-3 (college students dial around for many reasons, including having prepaid cards different from the school's long distance provider or to charge their parents' numbers).

256 ALTS 8YY Comments at 4; Focal/US LEC 8YY Comments at 4.

257 Time Warner 8YY Comments at 5; Time Warner 8YY Reply at 6 n.7. We also decline to find that all revenue-sharing agreements between a competing LEC and its customers based on minutes of use or access revenues generated by the customer are an unjust and unreasonable practice in violation of 201(b) because such a finding is beyond the scope of this proceeding. *See* AT&T 8YY Comments at 14-15. In its *Further Notice*, the Commission posed a number of questions concerning revenue-sharing agreements for the narrow purpose of determining whether such agreements justify immediately limiting competitive LEC access rates for all 8YY traffic to the rate of the competing incumbent LEC. *See CLEC Access Reform Order*, 16 FCC Rcd at 9963, paras. 101-102. The question of whether such arrangements violate the Act is beyond the scope of the *Further Notice*.

258 Additionally, the competitive LECs contend that cell phone use is dramatically reducing the volume of 8YY traffic, since calling card and dial-around traffic accounts for much of the 8YY traffic coming from the traditional generators of this traffic. Focal/US LEC 8YY Reply at 12.

259 Because we conclude that the incentive for fraudulent generation of minutes is not as strong as the IXCs suggest, we reject claims that the complaint process is not a feasible or practical means of addressing potential abuses. *See* AT&T 8YY Comments at 13; AT&T 8YY Reply at 12-14; Sprint 8YY Comments at 8; WorldCom Comments at 2-3. The record suggests that IXC allegations of wide-spread fraud may indeed be overstated. *See*
(continued....)

72. We also reject AT&T's request that we adopt a separate competitive LEC access rate for outbound 8YY traffic carried over dedicated local access facilities. We find that the record does not support adoption of a separate lower benchmark rate based on the incumbent LEC local switching rate. To the extent that AT&T is concerned that it is paying two carriers for originating a call, we have addressed that concern by clarifying that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions. When there are no intermediate carriers between the competitive LEC and the end-user, the fact that the end-user may provide some portion of the facilities would seem to be irrelevant. If AT&T believes that any particular competitive LEC rate or practice is unlawful, it may bring a challenge under section 208 of the Act.[260]

V. PROCEDURAL MATTERS

A. Supplemental Final Regulatory Flexibility Act Analysis

73. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[261] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the 1999 *Further Notice of Proposed Rulemaking* (*Notice*) in CC Docket No. 96-262.[262] The Commission sought written public comment on the proposals in that *Notice*, including comment on the IRFA. A Final Regulatory Flexibility analysis was provided in the *Sixth Report and Order*,[263] as well as the *Seventh Report and Order and Further Notice of Proposed Rulemaking (CLEC Access Reform Order)*.[264] This present Supplemental Final Regulatory Flexibility Act Analysis conforms to the RFA.[265] To the extent that any statement in this Supplemental FRFA is perceived as creating ambiguity with respect to Commission rules or statements made in the sections of these orders preceding the Supplemental FRFA, the rules and statement set forth in those preceding sections are controlling.

(Continued from previous page)
Time Warner 8YY Reply Comments at 2-3. *See also* Focal/US LEC 8YY Reply Comments at 6-7 (noting that AT&T makes its case based on a single allegation of fraud by one particular competing LEC); Network Plus 8YY Reply at 2 (stating that the IXCs "failed to produce any real evidence supporting their allegation that a 'wide-spread' problem exists with 8YY access charges"). Thus, the record does not support IXC claims of an industry-wide problem. *See, e.g.*, Sprint 8YY Comments at 8; Sprint 8YY Reply at 4.

260 *See* 47 U.S.C. § 208.

261 *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

262 *Access Charge Reform*, CC Docket No. 96-262, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221 (1999), 64 Fed. Reg. 51280 (Sept. 22, 1999).

263 *Access Charge Reform*, CC Docket No. 96-262, *Sixth Report and Order*, 15 FCC Rcd 12962 (2000), 65 Fed. Reg. 38684 (June 21, 2000)(*CALLS Order*).

264 *CLEC Access Reform Order*, 16 FCC Rcd 9923, 66 Fed. Reg. 27892 (May 21, 2001).

265 *See* 5 U.S.C. § 604.

1. Need for, and Objectives of, the Rules

74. In the *CLEC Access Reform Order*, the Commission revised its tariff rules more closely to align tariffed competitive LEC access rates with those of incumbent LECs.[266] Specifically, the Commission limited to a declining benchmark the amounts that competitive LECs may tariff for interstate access services; restricted the interstate access rates of competitive LECs entering new markets to the rates of the competing incumbent local exchange carrier (incumbent LEC); and established a rural exemption permitting qualifying carriers to charge rates above the benchmark for their interstate access services.[267] In adopting these rules, the Commission sought to ensure, by the least intrusive means possible, that competitive LEC access charges are just and reasonable.[268] The Commission also sought to reduce existing regulatory arbitrage opportunities, spur efficient local competition, and avoid disrupting the development of competition in the local telecommunications market.[269]

75. With this order, the Commission disposes of seven petitions for reconsideration or clarification of these rules, and a related waiver request. Specifically, the Commission rejects each of the reconsideration requests and related request for waiver, but makes several clarifications. In response to an issue raise by Qwest in a petition for clarification or, in the alternative, reconsideration,[270] the Commission clarifies that the benchmark rate is available only when a competitive LEC provides an IXC with access to the competitive LEC's own end-users.[271] The Commission finds that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions, and we amend the current rules in accordance with this finding.[272] The Commission also clarifies that the competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers.[273] The Commission concludes that the regulation of these rates is necessary for all the same reasons the Commission identified in the *CLEC Access Reform Order*.

76. The Commission also responds to a request by RICA to clarify whether PICCs may be tariffed in addition to the rural exemption rate specified in section 61.26(e) of the Commission's rules

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266 *CLEC Access Reform Order*, 16 FCC Rcd 9965, para. 108.

267 *See generally id.*

268 *Id.* at 9965, para. 107.

269 *Id.*

270 Qwest Petition at 2-4 (asking the Commission to clarify the rules to ensure that a competitive LEC charges only the portion of the competing incumbent LEC rate that reflects the services that the carrier actually provides). *See also supra* para. 10.

271 *See supra* para. 15.

272 *See supra* para. 17 & App. A. The Commission also finds that, prior to this order on reconsideration, it would not have been unreasonable for a competitive LEC to charge the tariffed benchmark rate for traffic to or from end-users of other carriers, provided that the carrier serving the end-user did not also charge the IXC and provided that the competitive LEC's charges were otherwise in compliance with and supported by its tariff. *See supra* para. 18.

273 *See supra* para. 21.

and whether PICCs may be tariffed when the competing incumbent LEC does not have a PICC.[274] In this order, the Commission clarifies that any PICC imposed by a competitive LEC qualifying for the rural exemption may be assessed in addition to the rural benchmark rate if and only to the extent that the competing incumbent LEC charges a PICC. In the *CLEC Access Reform Order*, the Commission found that the ability of rural competitive LECs to assess a multi-line business PICC obviated, in part, the need for a CCL charge because the PICC provided a potential revenue source.[275] This clarification will ensure that rural competitive LECs are able to assess a PICC on IXCs as intended by the Commission, but if and only to the extent that the competing incumbent LEC charges a PICC. Further, this clarification is necessary to more closely align tariffed competitive LEC access rates with those of incumbent LECs.

77. In a separate petition for clarification, U.S. TelePacific asks the Commission to clarify and establish a simple methodology by which the benchmark rate will be set where a competitive LEC service area includes territory served by more than a single incumbent LEC.[276] In this order, the Commission confirms that competitive LECs serving an area with multiple incumbent LECs can qualify for the safe harbor by charging different rates for access to particular end-users based on the access rate that would have been charged by the incumbent LEC in whose service area that particular end-user resides.[277] As an alternative method, the Commission will permit a competitive LEC to charge an IXC a blended access rate only if that rate reasonably approximates the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers.[278] By permitting an alternative methodology based on a blended rate, the Commission seeks to ensure that the competitive LEC access rates are just and reasonable, and, at the same time, to minimize the burdens associated with establishing several different rates within a competitive LEC's service area.

2. Legal Basis

78. These orders are adopted pursuant to sections 1-5, 201-205, 214, 218-220, 254, 303(r), 403, 405, 502 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, 201-205, 214, 218-220, 254, 303(r), 403, 405, 502 and 503.

3. Description and Estimate of the Number of Small Entities to which the Rules Will Apply

79. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.[279] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[280] In addition, the term "small business" has the

274 RICA Petition at 15-16. *See also supra* para. 40 (discussing this request for clarification).

275 *Access Charge Reform Order*, 16 FCC Rcd at 9956, para. 81

276 U.S. TelePacific Petition at 1. *See supra* para. 46.

277 *See supra* para. 47.

278 *See supra* para. 48.

279 5 U.S.C. §§ 603(b)(3), 604(a)(3).

280 *Id.* § 601(6).

same meaning as the term "small business concern" under the Small Business Act.[281] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[282]

80. In this section, we further describe and estimate the number of small entity licensees and regulatees that may also be indirectly affected by rules adopted pursuant to this *Order*. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.[283] The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,[284] Paging,[285] and Cellular and Other Wireless Telecommunications.[286] Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

81. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a wired telecommunications carrier having 1,500 or fewer employees), and "is not dominant in its field of operation."[287] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[288] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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[281] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

[282] 15 U.S.C. § 632.

[283] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Table 5.3 (May 2002) (*Trends in Telephone Service*).

[284] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in October 2002).

[285] *Id.* § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

[286] *Id.* § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[287] 5 U.S.C. § 601(3).

[288] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

82. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[289] According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.[290] Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more.[291] Thus, under this size standard, the majority of firms can be considered small.

83. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[292] According to Commission data,[293] 1,337 carriers reported that they were engaged in the provision of local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted herein.

84. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), and "Other Local Exchange Carriers."* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to providers of competitive exchange services or to competitive access providers or to "Other Local Exchange Carriers," all of which are discrete categories under which TRS data are collected. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[294] According to Commission data,[295] 609 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 companies, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees.[296] In addition, 35 carriers reported that they were "Other Local Service Providers." Of the 35 "Other Local Service Providers," an estimated 34 have 1,500 or fewer employees and one has more than 1,500 employees.[297] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, and "Other Local Exchange Carriers" are small entities that may be affected by the rules and policies adopted herein.

289 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

290 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513310 (issued October 2000).

291 *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

292 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

293 *Trends in Telephone Service* at Table 5.3.

294 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

295 *Trends in Telephone Service* at Table 5.3.

296 *Id.*

297 *Id.*

85. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[298] According to Commission data,[299] 261 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of these 261 companies, an estimated 223 have 1,500 or fewer employees and 38 have more than 1,500 employees.[300] Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the rules and policies adopted herein.

86. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to operator service providers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[301] According to Commission data,[302] 23 companies reported that they were engaged in the provision of operator services. Of these 23 companies, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees.[303] Consequently, the Commission estimates that the majority of operator service providers are small entities that may be affected by the rules and policies adopted herein.

87. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to payphone service providers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[304] According to Commission data,[305] 761 companies reported that they were engaged in the provision of payphone services. Of these 761 companies, an estimated 757 have 1,500 or fewer employees and four have more than 1,500 employees.[306] Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the rules and policies adopted herein.

88. *Prepaid Calling Card Providers.* The SBA has developed a size standard for a small business within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.[307] According to Commission data,[308] 37 companies

[298] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

[299] *Trends in Telephone Service* at Table 5.3.

[300] *Id.*

[301] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

[302] *Trends in Telephone Service* at Table 5.3.

[303] *Id.*

[304] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

[305] *Trends in Telephone Service* at Table 5.3.

[306] *Id.*

[307] 13 C.F.R. § 121.201, NAICS code 513330 (changed to 517310 in October 2002).

[308] *Trends in Telephone Service* at Table 5.3.

reported that they were engaged in the provision of prepaid calling cards. Of these 37 companies, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees.[309] Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by the rules and policies adopted herein.

89. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to "Other Toll Carriers." This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[310] According to Commission's data,[311] 92 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these 92 companies, an estimated 82 have 1,500 or fewer employees and ten have more than 1,500 employees.[312] Consequently, the Commission estimates that most "Other Toll Carriers" are small entities that may be affected by the rules and policies adopted herein.

90. *Paging.* The SBA has developed a small business size standard for Paging, which consists of all such firms having 1,500 or fewer employees.[313] According to Census Bureau data for 1997, in this category there was a total of 1,320 firms that operated for the entire year.[314] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional seventeen firms had employment of 1,000 employees or more.[315] Thus, under this size standard, the majority of firms can be considered small.

91. *Cellular and Other Wireless Telecommunications.* The SBA has developed a small business size standard for Cellular and Other Wireless Telecommunication, which consists of all such firms having 1,500 or fewer employees.[316] According to Census Bureau data for 1997, in this category there was a total of 977 firms that operated for the entire year.[317] Of this total, 965 firms had

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309 *Id.*

310 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

311 *Trends in Telephone Service* at Table 5.3.

312 *Id.*

313 13 C.F.R. § 121.201, NAICS code 517211 (changed from 513321 in October 2002).

314 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513321 (issued October 2000).

315 *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

316 13 C.F.R. § 121.201, NAICS code 517212 (changed from 513322 in October 2002).

317 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513322 (issued October 2000).

employment of 999 or fewer employees, and an additional twelve firms had employment of 1,000 employees or more.[318] Thus, under this size standard, the majority of firms can be considered small.

92. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[319] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years."[320] These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[321] No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[322] On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Based on this information, the Commission concludes that the number of small broadband PCS licenses will include the 90 winning C Block bidders, the 93 qualifying bidders in the D, E, and F Block auctions, the 48 winning bidders in the 1999 re-auction, and the 29 winning bidders in the 2001 re-auction, for a total of 260 small entity broadband PCS providers, as defined by the SBA small business size standards and the Commission's auction rules. We note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

93. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size

318 *Id.* The census data do not provide a more precise estimate of the number of firms that have 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

319 *See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 61 FR 33859 (July 1, 1996); *see also* 47 C.F.R. § 24.720(b).

320 *See id.*

321 *See. e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 59 FR 37566 (July 22, 1994).

322 FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (rel. January 14, 1997). *See also Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 62 FR 55348 (Oct. 24,1997).

standard in the *Narrowband PCS Second Report and Order.*[323] A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards.[324] In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future actions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined under the Commission's Rules. The Commission assumes, for purposes of this analysis, that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

94. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This standard provides that such a company is small if it employs no more than 1,500 persons.[325] According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[326] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[327] If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business size standard.

95. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[328] This small business size standard indicates that a "small

[323] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, Docket No. ET 92-100, Docket No. PP 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 65 FR 35875 (June 6, 2000).

[324] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

[325] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[326] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Employment Size of Firms Subject to Federal Income Tax: 1997," Table 5, NAICS code 513322 (issued Oct. 2000).

[327] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[328] *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, (continued....)

business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[329] A "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small business size standards.[330] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[331] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[332]

96. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards "small entity" and "very small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years, or that had revenues of no more than $3 million in each of the previous calendar years.[333] The SBA has approved these size standards.[334] The Commission awards "small entity" and "very small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz bands to firms that had revenues of no more than $40 million in each of the three previous calendar years, or that had revenues of no more than $15 million in each of the previous calendar years.[335] These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities. We note

(Continued from previous page)
Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, paras. 291-95 (1997) (*220 MHz Third Report and Order*).

329 *Id.* at 11068-70, para. 291.

330 *See* letter to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

331 *See generally* Public Notice, "220 MHz Service Auction Closes," 14 FCC Rcd 605 (1998).

332 Public Notice, "Phase II 220 MHz Service Spectrum Auction Closes," 14 FCC Rcd 11218 (1999).

333 47 C.F.R. § 90.814(b)(1).

334 *See* Letter from Aida Alvarez, Administration, Small Business Administration to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (Oct. 27, 1997). *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas Sugrue, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 10, 1999).

335 47 C.F.R. § 90.814(b)(1) A request for approval of 800 MHz standards was sent to the SBA on May 13, 1999. The matter remains pending.

that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

97. *Private and Common Carrier Paging.* In the Paging *Third Report and Order*, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[336] A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these size standards.[337] An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.[338] Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private-Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 471 carriers reported that they were engaged in the provision of either paging and messaging services or other mobile services.[339] Of those, the Commission estimates that 450 are small, under the SBA business size standard specifying that firms are small if they have 1,500 or fewer employees.[340]

98. *700 MHz Guard Band Licensees.* In the 700 MHz Guard Band Order, we adopted a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[341] A "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.[342] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13,

336 *220 MHz Third Report and Order,* 12 FCC Rcd at 11068-70, paras. 291-295, 62 FR 16004 at paras. 291-295 (1997).

337 *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas Sugrue, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (June 4, 1999).

338 *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems,* WT Docket No. 96-18, PR Docket No. 93-253, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10085, para. 98 (1999).

339 *Trends in Telephone Service* at Table 5.3.

340 *Id.* The SBA size standard is that of Paging, 13 C.F.R. § 121.201, NAICS code 517211.

341 *See Service Rules for the 746-764 MHz Bands, and Revisions to part 27 of the Commission's Rules,* WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299, 5344, para. 108 (2000).

342 *See generally* Public Notice, "220 MHz Service Auction Closes," Report No. WT 98-36 (Wireless Telecommunications Bureau, Oct. 23, 1998).

2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[343]

99. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[344] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).[345] The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[346] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

100. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.[347] We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[348] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

101. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[349] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed

[343] Public Notice, "700 MHz Guard Band Auction Closes," DA 01-478 (rel. Feb. 22, 2001).

[344] The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[345] BETRS is defined in §§ 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

[346] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[347] The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[348] 13 C.F.R § 121.201, NAICS codes 513322 (changed to 517212 in October 2002).

[349] *Id.* § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

$3 million.[350] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

102. *Fixed Microwave Services.* Fixed microwave services include common carrier,[351] private operational-fixed,[352] and broadcast auxiliary radio services.[353] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[354] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

103. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[355] There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services.[356] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[357]

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[350] *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

[351] *See* 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

[352] Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[353] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

[354] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[355] This service is governed by Subpart I of Part 22 of the Commission's Rules. *See* 47 C.F.R. §§ 22.1001-22.1037.

[356] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[357] *Id.*

104. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A "small business" is an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards.[358] The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a "small business" entity. We conclude that the number of geographic area WCS licensees affected by this analysis includes these eight entities.

105. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of $40 million or less in the three previous calendar years.[359] An additional size standard for "very small business" is: an entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[360] The SBA has approved these small business size standards.[361] The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and policies adopted herein.

106. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and ITFS.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[362] In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[363] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts.[364] According to Census Bureau data for 1997, there were a total

358 *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

359 *See* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order*, 63 FR 6079 (Feb. 6, 1998).

360 *Id.*

361 *See* Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

362 *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593 para. 7 (1995).

363 47 C.F.R. § 21.961(b)(1).

364 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002).

of 1,311 firms in this category, total, that had operated for the entire year.[365] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[366] Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

107. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[367] The auction of the 1,030 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[368] An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[369] The SBA has approved these small business size standards in the context of LMDS auctions.[370] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers.

108. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the

365 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

366 In addition, the term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

367 *See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, and to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, 12 FCC Rcd 12545 (1997).

368 *Id.*

369 *See id.*

370 *See* Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

previous two years.[371] In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we established a small business size standard for a "small business" as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years.[372] A "very small business" is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years.[373] The SBA has approved these size standards.[374] We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum.

109. *24 GHz – Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of "Cellular and Other Wireless Telecommunications" companies. This category provides that such a company is small if it employs no more than 1,500 persons.[375] According to Census Bureau data for 1997, there were 977 firms in this category that operated for the entire year.[376] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[377] Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[378] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

110. *24 GHz – Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for "small business" is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of $15 million.[379]

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371 *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 59 FR 24947 (May 13, 1994).

372 *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 64 FR 59656 (Nov. 3, 1999).

373 *Id.*

374 *See* Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (Jan. 6, 1998).

375 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

376 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Employment Size of Firms Subject to Federal Income Tax: 1997," Table 5, NAICS code 513322 (issued Oct. 2000).

377 *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

378 Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

379 *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 (2000); *see also* 47 C.F.R. § 101.538(a)(2).

"Very small business" in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[380] The SBA has approved these small business size standards.[381] These size standards will apply to the future auction, if held.

111. *Internet Service Providers.* While internet service providers (ISPs) are only indirectly affected by our present actions, and ISPs are therefore not formally included within this present IRFA, we have addressed them informally to create a fuller record and to recognize their participation in this proceeding. The SBA has developed a small business size standard for Online Information Services, which consists of all such companies having $21 million or less in annual receipts.[382] According to Census Bureau data for 1997, there were 2,751 firms in this category, total, that operated for the entire year.[383] Of this total, 2,659 firms had annual receipts of $9,999,999 or less, and an additional 67 had receipts of $10 million to $24,999,999.[384] Thus, under this size standard, the great majority of firms can be considered small.

112. *Satellite Service Carriers.* The SBA has developed a size standard for small businesses within the category of Satellite Telecommunications. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.[385] According to Commission data, 31 carriers reported that they were engaged in the provision of satellite services.[386] Of these 31 carriers, an estimated 25 have 1,500 or fewer employees and six, alone or in combination with affiliates, have more than 1,500 employees.[387] Consequently, the Commission estimates that there are 31 or fewer satellite service carriers which are small businesses that may be affected by the rules and policies proposed herein.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

113. In this order, the Commission finds that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions, and we amend the current rules in accordance with this finding. This amendment requires competitive LECs to review the federal tariff of the competing incumbent LEC to determine the rate charged for various functions or services. Under the current rules, after June 21, 2004, review of the competing incumbent LEC's tariff is required to determine the

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380 *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd at 16967; *see also* 47 C.F.R. § 101.538(a)(1).

381 *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

382 13 C.F.R. § 121.201, NAICS code 514191 (changed to 518111 in October 2002).

383 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Receipts Size of Firms Subject to Federal Income Tax: 1997," Table 4, NAICS code 514191 (issued October 2000).

384 *Id.*

385 13 CFR § 121.201, NAICS code 513340 (changed to 517410 in October of 2002).

386 *Telephone Trends Report* at Table 5.3.

387 *Id.*

"competing ILEC rate."[388] Therefore, this amendment does not modify the existing compliance requirement.

114. Pursuant to a rule clarification adopted in this order, if a competitive LEC eligible to charge a higher access rate pursuant to the rural exemption chooses to also charge a PICC, the competitive LEC is required to review the federal tariff of the competing incumbent LEC to see if the incumbent LEC for that particular end-user charges a PICC, and if so, the amount of that incumbent LEC's PICC. Under the current rules, review of the competing incumbent LEC's tariff is required to determine the rural exemption amount. Therefore, this clarification does not modify the existing compliance requirement.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

115. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[389]

116. Throughout this order, we seek to further resolve questions and contentious issues that remain with respect to competitive LEC access services. Because there are both small entity IXCs and small entity competitive LECs – often with conflicting interests in this proceeding – we expect that small entities will be affected by the clarifications adopted in this decision. As discussed below, we conclude, based on a consideration both of the steps needed to minimize significant economic impact on small entities and of significant alternatives, that our clarifications best balance the goals of removing opportunities for regulatory arbitrage and minimizing the burdens placed on carriers.

117. In this order, the Commission clarifies that the benchmark rate is available only when a competitive LEC provides an IXC with access to the competitive LEC's own end-users. With this clarification, the Commission will minimize the opportunity for regulatory arbitrage, and ensure that small IXCs continue to pay just and reasonable rates for competitive LEC switched access services. This clarification also ensures that IXCs continue to accept and pay for competitive LEC access services, thereby protecting universal connectivity.

118. In adopting this clarification, the Commission considers and rejects the alternative approach advanced by some competitive LECs, which would permit competitive LECs to charge the full benchmark rates when they provide any component of the interstate switched access services used in connecting an end-user to an IXC.[390] We believe that an approach in which rates are not tethered to the provision of particular services would be an invitation to abuse because it would enable multiple competitive LECs to impose the full benchmark rate on a single call.[391] This outcome would be

[388] 47 C.F.R. § 61.26(c).

[389] 5 U.S.C. § 603(c).

[390] *See supra* paras. 14-16.

[391] *See supra* para. 14.

inconsistent with the Commission's goal to ensure just and reasonable competitive LEC access rates. The approach advanced by competitive LECs also would enable competitive LECs to discriminate among IXCs, including small entities, by providing varying levels of service for the same price.[392] Thus, we believe the clarification provided will minimize the impact that excessive rates and discriminatory behavior may have on IXCs, including any small businesses.

119. The Commission finds that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions.[393] We conclude that regulation of these rates is necessary for the all the reasons that we identified in the *CLEC Access Reform Order*.[394] Specifically, an IXC may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power.[395] At the same time, the Commission declines to require a specific rate structure or rate elements for the services provided by a competitive LEC in an effort to minimize the regulatory burdens on competitive LECs, including small businesses.

120. In addition, the Commission clarifies that the competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers.[396] In providing this clarification, the Commission considers and rejects the proposal advanced by NewSouth because it would allow competitive LECs to charge IXCs, including small entities, for services they may not provide.[397] We find that clarification of the competing incumbent LEC rate is necessary to avoid litigation and uncertainty.[398] Eliminating the uncertainty surrounding the existing rules will benefit both competitive LECs and IXCs, including small businesses, by preventing potential billing disputes.

121. The Commission also clarifies the application of the multi-line business PICC under the rural exemption.[399] Although Sprint advances an alternative interpretation of how the PICC is to be calculated under the rural exemption, that interpretation would deprive competitive LECs, including small entities, of additional revenues taken into account when formulating the rural exemption in the

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392 *See supra* para. 14.

393 *See supra* para. 17. The Commission also finds that, prior to this order on reconsideration, it would not have been unreasonable for a competitive LEC to charge the tariffed benchmark rate for traffic to or from end-users of other carriers, provided that the carrier serving the end-user did not also charge the IXC and provided that the competitive LEC's charges were otherwise in compliance with and supported by its tariff. *See supra* para. 18. In making this finding, the Commission considers and rejects arguments that prior Commission decisions addressed the appropriate rate a competitive LEC may charge when it is not serving the end-user. *See supra* para. 18. Because prior Commission decisions did not address this issue, this approach balances the interests of competitive LECs and IXCs, including small entities, by resolving disputes based on the services provided.

394 *CLEC Access Reform Order*, 16 FCC Rcd at 9965, para. 107.

395 *See supra* para. 17.

396 *See supra* para. 21.

397 *See supra* para. 20-21.

398 *See supra* para. 21.

399 *See supra* paras. 40-41.

CLEC Access Reform Order.[400] Under the clarification provided, a competitive LECs seeking to charge a PICC under the rural exemption must determine whether the competing incumbent LEC charges a PICC and the amount of that PICC. Although this imposes a minimal additional burden on competitive LECs, the additional burden is outweighed by the direct benefit of additional access revenues in rural areas in prescribed circumstances.

122. Moreover, in this order, the Commission clarifies what access rate applies when more than one incumbent LEC operates within a competitive LEC's service area.[401] The Commission agrees with competitive LECs that, without such clarification of the current rules, competitive LEC market entry will be delayed or possibly abandoned altogether because of uncertainty about rates and the prospect of IXC refusal to pay, or litigation. Eliminating the uncertainty surrounding the existing rules will benefit both competitive LECs and IXCs, including small businesses, by preventing potential billing disputes.

123. Further, in clarifying the applicable access rate in these circumstances, the Commission determined that it would permit a competitive LEC to charge an IXC a blended access rate if that rate reasonably approximates the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers.[402] The Commission will permit a blended rate in some circumstances because it recognizes that requiring different rates for individual end-users within a service area might be particularly burdensome for small entities. Although the Commission considered specific alternative methods for determining the blended rate, it declines to specify the precise manner in which a competitive LEC must set its access rates when it serves the area of multiple incumbent LECs.[403] Rather, the Commission requires only that the blended access rate reasonably approximate the rate that an IXC would have paid to the competing incumbent LEC for access to the competitive LEC's customers.[404] The adopted approach balances the needs of small entities for flexibility in formulating a blended rate, yet ensures that the blended rate is just and reasonable in accordance with the Act.

124. Overall, we believe that this order best balances the competing goals that we have for our rules governing competitive LEC switched access charges. Neither in *CLEC Access Reform Order* nor in consideration of the petitions for reconsideration and clarification has there been any identification of additional alternatives that would have further limited the impact on all small entities while remaining consistent with Congress' pro-competitive objectives set out in the Act.

6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

125. None.

B. Final Regulatory Flexibility Certifications (FRFC)

126. The RFA requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have

400 *See supra* paras. 40-41.

401 *See supra* paras. 46-48.

402 *See supra* para. 48.

403 *See supra* para. 48.

404 *See supra* para. 48.

a significant economic impact on a substantial number of small entities."[405] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[406] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[407] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[408]

1. Fifth Order on Reconsideration

a. Background

127. In this order, the Commission clarifies some rules in ways that are not expected to have a significant economic impact on a substantial number of small entities. Specifically, in addition to the clarifications discussed in the supplemental FRFA above, the Commission clarifies the existing relationship between the CLEC new markets rule and the rural exemption.[409] In particular, petitioners seek confirmation that new market rule does not apply if the competitive LEC would otherwise qualify for the rural exemption.[410] The Commission agrees that this is the correct interpretation of the existing rule and amends rule 61.26(e) to more clearly reflect the Commission's original intent.[411] The Commission also amends rule 61.26(e) to remove references to rate elements that have been eliminated by the Commission.[412] Further, the Commission clarifies the source of its authority to impose interconnection obligations on IXCs under section 201(a).[413]

b. Substantive Information

128. The amendment to section 61.26(e) of the Commission rules simply clarifies and codifies the existing relationship between the CLEC new markets rule and the rural exemption, and removes references to rate elements that have since been eliminated by the Commission. Because there is no change to the meaning or impact of the existing rule, this amendment will have no significant economic

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405 *Id.* § 605(b).

406 *Id.* § 601(6).

407 *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

408 15 U.S.C. § 632.

409 *See supra* para. 30 (discussing the relationship between subsections (d) and (e) of section 61.26 of the Commission's rules).

410 *See* MCLEC Petition at 11-13; RICA Petition at 11-12. *See also supra* para. 30.

411 *See supra* para. 30 & App. A.

412 *See supra* note 137 & App. A.

413 *See supra* paras. 59-61.

impact. Similarly, the Commission's clarification concerning the source of its authority does not change the meaning or impact of the existing rule on large and small entities.

129. Therefore, we certify that these requirements will not have a significant economic impact on a substantial number of small entities.

2. Eighth Report and Order

a. Background Information

130. In the *Eighth Report and Order*, the Commission declines to set a separate access rate for originating toll-free (8YY) traffic and allows it to be governed by the same declining benchmark that applies to other competitive LEC interstate access traffic.[414] In a further notice of proposed rulemaking issued with the *CLEC Access Reform Order*, the Commission raised questions relating to 8YY traffic originating on competitive LEC networks.[415] The Commission sought this information because AT&T had asserted that abuses surrounding competitive LEC-originated 8YY traffic justified immediately capping the access rate for this category of traffic at the rate of the competing incumbent LEC.[416] The Commission determines that the record does not support IXCs' claims that commission payments to 8YY generators translate effectively into incentives for the individuals who actually use those facilities to place excessive or fraudulent 8YY calls.[417]

b. Substantive Information

131. Because competitive LECs currently charge IXCs the previously established, declining benchmark rate for 8YY traffic, the Commission's decision results in no change to existing competitive LEC access charges for 8YY traffic. Thus, the Commission's decision will have no significant economic impact on competitive LECs or IXCs, large and small.

132. Therefore, we certify that these requirements will not have a significant economic impact on a substantial number of small entities.

C. No Regulatory Flexibility Analysis or Certification Required

133. In the *CLEC Access Reform Order*, the Commission provided an FRFA that conformed to the RFA.[418] In this present order, the Commission denies petitions for reconsideration and a petition for waiver.[419] Because the Commission promulgates no additional or revised final rules in response to petitions for reconsideration or the petition for waiver, our present action on these petitions is not an RFA matter.

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414 *See supra* paras. 69-72.

415 *See CLEC Access Reform Order*, 16 FCC Rcd at 9961-64, paras. 99-104.

416 *Id.* at 9961-62, para. 98.

417 *See supra* para. 70.

418 *Id.* at 9964-71, paras. 106-28.

419 Specifically, the Commission denies petitions for reconsideration filed by Focal Communications, Corp. and US LEC Corp., Qwest Communications International, Inc., TDS Metrocom, Inc., and Time Warner Telecom. The petition for waiver was filed by Z-Tel Communications, Inc.

D. Final Paperwork Reduction Act Analysis

134. This action contained herein contains no new or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

E. Report to Congress

135. The Commission will send a copy of these orders, including this Supplemental FRFA and FRFCs, in a report to be sent to Congress pursuant to the Congressional Review Act.[420] In addition, the Commission will send a copy of these orders, including the Supplemental FRFA and FRFCs, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of these orders and Supplemental FRFA (or summaries thereof) and FRFCs will also be published in the Federal Register.[421]

VI. ORDERING CLAUSES

136. Accordingly, IS IT ORDERED that, pursuant to the authority contained in sections 1-5, 201-205, 214, 218-220, 254, 303(r), 403, 405, 502 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, 201-205, 214, 218-220, 254, 303(r), 403, 405, 502 and 503, this EIGHTH REPORT AND ORDER AND FIFTH ORDER ON RECONSIDERATION, with all attachments, including revisions to Part 61 of the Commission's rules, 47 C.F.R. Part 61, is hereby ADOPTED.

137. IT IS FURTHER ORDERED that these orders and rule revisions adopted in these orders SHALL BECOME EFFECTIVE thirty (30) days after publication in the Federal Register.

138. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this EIGHTH REPORT AND ORDER AND FIFTH ORDER ON RECONSIDERATION, including the Supplemental Final Regulatory Flexibility Analysis and Final Regulatory Flexibility Certifications, to the Chief Counsel for Advocacy of the Small Business Administration.

139. IT IS FURTHER ORDERED that the Petitions for Reconsideration and Petitions for Clarification filed by Focal Communications Corp. and US LEC Corp., Qwest Communications International, Inc., TDS Metrocom, Inc., and Time Warner Telecom ARE DENIED.

140. IT IS FURTHER ORDERED that the Petition for Clarification filed by U.S. TelePacific Corp. IS DENIED IN PART AND GRANTED IN PART, to the extent discussed herein.

141. IT IS FURTHER ORDERED that the Petitions for Reconsideration and/or Clarification filed by the Minnesota CLEC Consortium and Rural Independent Competitive Alliance ARE DENIED IN PART AND GRANTED IN PART, to the extent discussed herein.

142. IT IS FURTHER ORDERED that the Petition of Z-Tel Communications Inc., for Temporary Waiver of Commission Rule 61.26(d) is DENIED.

143. IT IS FUTHER ORDERED that the Petition of TDS Metrocom, Inc. for Stay Pending Reconsideration is DENIED AS MOOT.

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420 *See* 5 U.S.C. § 801(a)(1)(A).

421 *See* 5 U.S.C. § 604(b).

144. IT IS FURTHER ORDERED that the Emergency Petition of Mpower Communications Corp. and North County Communications, Inc. for Stay of Order is DENIED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A – Final Rules

AMENDMENT TO THE CODE OF FEDERAL REGULATIONS

For the reasons discussed in the preamble, the Federal Communication Commission amends Part 61 of Title 47 of the Code of Federal Regulations as follows:

1. The authority citation for Part 61 continues to read as follows:

Authority: Secs. 1, 4(i), 4(j), 201-205 and 403 of the Communications Act of 1934, as amended; 47 U.S.C 151, 154(i), 154(j), 201-205 and 403, unless otherwise noted.

2. Section 61.26 is amended by revising paragraphs (a)(1) and (a)(2), revising paragraph (e), and adding a new paragraph (f) as follows:

§ 61.26 Tariffing of competitive interstate switched exchange access services.

(a) * * *
(1) *CLEC* shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user and does not fall within the definition of "incumbent local exchange carrier" in 47 U.S.C. 251(h).
(2) *Competing ILEC* shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC.

* * *

(e) *Rural exemption.* Notwithstanding paragraphs (b) through (d) of this section, a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching. In addition to the rate described above, the rural CLEC may assess a presubscribed interexchange carrier charge if, and only to the extent that, the competing ILEC assesses this charge.

(f) If a CLEC provides some portion of the interstate switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services.

APPENDIX B

PETITIONS FOR RECONSIDERTATION AND/OR CLARIFICATION
CC DOCKET NO. 96-262

Petitions for Reconsideration and/or Clarification

Focal Communications Corp. and U.S. LEC Corp. (Focal Petition)
Minnesota CLEC Consortium (MCLEC Petition)
Qwest Communications International, Inc. (Qwest Petition)
Rural Independent Competitive Alliance (RICA Petition)
TDS Metrocom, Inc. (TDS Petition)
Time Warner Telecom (Time Warner Petition)
U.S. TelePacific Corp. (TelePacific Petition)

Comments and Oppositions

Association for Local Telecommunications Services (ALTS Comments)
Association of Communications Enterprises (ASCENT Comments)
AT&T Corp. (AT&T Opposition)
Focal Communications Corp. and US LEC Corp. (Focal Comments)
Iowa Telecommunications Services, Inc. (Iowa Telecom Opposition)
Sprint Corporation (Sprint Opposition)
Time Warner Telecom (Time Warner Comments)
WorldCom, Inc. (WorldCom Opposition)
Z-Tel Communications, Inc. (Z-Tel Opposition)

Replies

Association of Communications Enterprises (ASCENT Reply)
Focal Communications Corp. and US LEC Corp. (Focal Reply)
Minnesota CLEC Consortium (MCLEC Reply)
Rural Independent Competitive Alliance (RICA Reply)
TDS Metrocom, Inc. (TDS Reply)
U.S. TelePacific Corp. (TelePacific Revised Reply)

APPENDIX C

PETITION OF Z-TEL FOR TEMPORARY WAIVER, CCB/CPD FILE NO. 01-19

Comments and Oppositions

Association of Communications Enterprises (ASCENT Waiver Comments)
AT&T Corp.(AT&T Waiver Opposition)
Focal Communications Corporation and Pac-West Telecomm, Inc. (Focal/Pac-West Waiver Comments)
IDT Corporation (IDT Waiver Comments)
Sprint Communications Company L.P. (Sprint Waiver Opposition)
TDS Metrocom, Inc. and USLINK, Inc. (TDS/US LINK Waiver Comments)

Replies

Association for Local Telecommunications Services (ALTS Waiver Reply)
Sprint Communications Company L.P. (Sprint Waiver Reply)
Z-Tel Communications, Inc. and Z-Tel Communications of Virginia, Inc. (Z-Tel Waiver Reply)

APPENDIX D

COMMENTS AND REPLY COMMENTS RE ACCESS RATES FOR 8YY TRAFFIC, CC DOCKET NO. 96-262

Comments

Association of Communications Enterprises (ASCENT 8YY Comments)
Association for Local Telecommunications Services (ALTS 8YY Comments)
Association for Telecommunications Professionals in Higher Education (ACUTA 8YY Comments)
AT&T Corp. (AT&T 8YY Comments)
Focal Communications Corp. and US LEC Corp. (Focal/US LEC 8YY Comments)
Minnesota CLEC Consortium (MCLEC 8YY Comments)
Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO 8YY Comments)
Rural Impendent Competitive Alliance (RICA 8YY Comments)
Sprint Corporation (Sprint 8YY Comments)
Time Warner Telecom (Time Warner 8YY Comments)
U.S. TelePacific Corp. (TelePacific 8YY Comments)
WorldCom, Inc. (WorldCom 8YY Comments)
Z-Tel Communications, Inc. (Z-Tel 8YY Comments)

Replies

Association of Communications Enterprises (ASCENT 8YY Reply)
AT&T Corp. (AT&T Reply)
Focal Communications Corp. and US LEC Corp. (Focal/US LEC 8YY Reply)
Network Plus, Inc. (Network Plus 8YY Reply)
Sprint Corporation (Sprint 8YY Reply)
Time Warner Telecom (Time Warner 8YY Reply)
U.S. TelePacific Corp. (TelePacific 8YY Reply)

STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Petition of Z-Tel Communications, Inc. For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, Eighth Report and Order and Fifth Order on Reconsideration, CC Docket 96-262

Today's Order removes a regulatory quirk that has for too long led carriers into regulatory arbitrage schemes. It represents the culmination of our efforts, begun in 2001, to quiet the financial and regulatory uncertainty for both competitive LECs and inter-exchange carriers (IXCs) in the market for access services. Today, we arrive at our transition to equalized switched access rates by reaffirming our commitment to prevent arbitrage and answer a number of questions that have led to numerous disputes between carriers.

We resolve those petitions and establish a clear regulatory framework for facilities-based competitive LECs going forward. Today's order affirms our prior decision to eliminate uneconomic subsidies to certain carriers, and we reject arguments that the *CLEC Access Reform Order* somehow permits competitive LECs to charge the full benchmark rate when they provide any small piece of interstate switched access services. In so doing, we clarify that on a prospective basis, carriers are permitted to charge the full benchmark rate only to the extent that a CLEC provides an IXC with access to its own end-users. Furthermore, we give meaning to the "competing ILEC rate" that a CLEC must charge for access while preserving CLEC flexibility to structure their access rates in a manner that may vary from the incumbent LEC's rate structure. Doing so will settle the regulatory environment and will allow facilities-based CLECs to use resources for facilities investment instead of litigation. Access rates, like all other tariffed rates, must be just and reasonable under section 201(b) of the Act. Today's action ensures that carriers satisfy that statutory requirement to the benefit of providers who have deployed facilities to serve end user customers.

EXHIBIT 6

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform for Incumbent	)	CC Docket No. 98-77
Local Exchange Carriers Subject to	)	
Rate-of-Return Regulation	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: May 26, 1998 **Released: June 4, 1998**

Comment Date: July 17, 1998
Reply Date: August 17, 1998

By the Commission:

Table of Contents Paragraph

I. INTRODUCTION

A. Overview

1. In passing the Telecommunications Act of 1996 (1996 Act),[1] Congress sought to establish "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry.[2] In this proceeding, as in others implementing the 1996 Act, we seek to unleash the dynamic forces of competition and deregulation in the telecommunications industry to serve the interests of the nation's consumers. We believe that our mandate from Congress directs us to foster the delivery of the benefits of competition to consumers throughout the country, and not only to those living in the most densely populated areas where the seeds of competition in local telecommunications markets may have already begun to take root.

2. Access reform is one of a series of actions that collectively are intended to foster and accelerate the introduction of efficient competition in all telecommunications markets, pursuant to the mandate of the 1996 Act. In the *Access Charge Reform Order*,[3] we set in motion the forces of competition and deregulation in local telecommunications markets served by incumbent local exchange carriers (LECs) subject to price cap regulation. The 1996 Act, however, expressly provides that "Consumers in all regions of the Nation . . . should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."[4] With this Notice of Proposed Rulemaking (NPRM),[5] we commence a further proceeding on access reform to mobilize the same forces to serve the interests of consumers located in those rural and suburban areas that are served by incumbent LECs subject to rate-of-return regulation. The first step in this reform process is to enable these rate-of-return LECs to assess interstate access charges that are more consistent with principles of cost-causation and economic efficiency. Smaller, rate-of-return LECs currently are very concerned that their existing high per-minute rates for interstate access place them at a significant disadvantage in attempting to compete with new access service providers. In particular, these companies fear that the rate structures and levels mandated by our current access charge rules make their most lucrative customers, those that make many long distance calls, especially vulnerable to competing offers from new entrants. These rate-of-return LECs need to be allowed to move their rates to more economically efficient levels. Otherwise, they face the potential loss of

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et. seq* (1996 Act). Hereinafter, all citations to the 1996 Act will be to the 1996 Act as codified in the United States Code.

[2] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (*Joint Explanatory Statement*).

[3] *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) (*Access Charge Reform Order*); Order on Reconsideration, 12 FCC Rcd 10119 (1997); *appeal pending sub nom. Southwestern Bell Tel. Co. v. FCC*, No. 97-2618 (and consolidated cases) (8th Cir. argued Jan. 15, 1998); Second Order on Reconsideration, 12 FCC Rcd 16606 (1997).

[4] 47 U.S.C. § 254(b)(3).

[5] A brief discussion of the genesis of the access charge structure, the current regulatory regime for incumbent LECs, and the uneconomic nature of certain of the access charge rate structure rules is contained in the "Background" section of the *Access Charge Reform Order*, 12 FCC Rcd at 15990-15998 ¶¶ 17 - 34.

customers to less efficient new entrants whose rates are lower than those currently assessed by the incumbent LECs, but higher than the rates these LECs would charge if our access charge rules were reformed. In addition, of course, reductions in interstate access charge per-minute rates should translate into lower per-minute long distance charges for consumers, which benefits both customers and carriers -- customers get more value for their money, and can afford to make more long distance calls, while carriers obtain additional revenues.

3. With this notice, we continue the process of reforming the access charge rate structure for rate-of-return LECs that was begun in the *Access Charge Reform Order* with the modifications to the transport rate structure, the reallocation of costs in the transport interconnection charge (TIC), and the amendments reflecting the changes necessary to implement universal service. In doing so, we intend to build on the analysis of the access charge rate structure developed in the *Access Charge Reform Order*. Prior to the adoption of the *Access Charge Reform Order*, price cap LECs were subject to essentially the same rate structure rules that currently apply to rate-of-return LECs. While rate-of-return LEC costs generally may be higher than price cap LEC costs due to longer loops or lower economies of scale, the two groups of carriers incur costs in the same manner, and similar economic principles should apply. Subject to receiving evidence showing that differences exist between price cap LECs and rate-of-return LECs that require different rules to achieve the goal of fostering an efficient, competitive marketplace, we propose to amend the access charge rules for rate-of-return LECs in a manner similar to that adopted for price cap LECs.

4. We recognize that access reform for the smaller, rate-of-return LECs may raise new or different issues that we did not have to address in our proceeding involving the typically larger, price cap LECs. For this and other reasons, we previously determined that we would address access reform for rate-of-return LECs in a separate proceeding. We further recognize that differences in the circumstances of rate-of-return and price cap incumbent LECs may require different approaches to reform, including a different transition to more economically efficient, cost-based interstate access charges. We seek to ensure that, at the end of the transition, all Americans enjoy the benefits of competition. By varying the transitional mechanisms, we can ensure that the process of getting to those benefits is as smooth as possible.

5. In this notice we propose to reform the access charge rate structure of rate-of-return LECs. We address many of the most fundamental economic inefficiencies in the current structure and will lay a foundation on which to develop further initiatives for rate-of-return LECs, including the rural LECs, most of whom are subject to rate-of-return regulation. In a subsequent phase of this proceeding, we intend to address the very difficult question of when, and how much, additional pricing flexibility should be afforded to rate-of-return LECs. We also intend to address, in a future proceeding, alternative forms of regulation for LECs currently subject to rate-of-return regulation. Such alternative regulatory structures could offer incentives to rate-of-return LECs that are able to become more efficient.

6. The *Access Charge Reform Order* and the *Universal Service Order* made the modifications necessary to implement the revisions to the universal service support mechanisms adopted in the *Universal Service Order*.[6] This notice is not intended to address contentions that some additional costs

[6] The sole exception is the development of the CCL rate for the National Exchange Carrier Association (NECA) common line pool. That issue was addressed in a separate order in response to NECA's petition for reconsideration or, in the alternative, a waiver, filed July 11, 1997. *Access Charge Reform*, CC Docket No. 96-262, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606 (1997).

or services should receive universal service support; those matters will be resolved in the Universal Service proceeding. We note that the Commission has determined that there shall be no change in the existing high cost support mechanisms for rural LECs until January 1, 2001, at the earliest. This means that, in the interim, the amount of universal service support for rural local exchange carriers will be maintained initially at existing levels and should increase in accordance with specified factors, such as inflation, that have historically guided changes in such support.

B. Background

1. Telecommunications Act Implementation

7. In the *Local Competition Order*,[7] the Commission set forth rules to implement section 251 and section 252 of the Communications Act of 1934, as amended.[8] As with all of Part II of Title II of the Communications Act, those sections, and the rules implementing them, seek to remove the legal, regulatory, economic, and operational barriers to telecommunications competition. Among other things, sections 251 and 252 provide entrants with the opportunity to compete for consumers in local markets by constructing new facilities, leasing unbundled network elements, and reselling telecommunication services. The Act, however, places limits on the applicability of sections 251(b) and (c) to smaller incumbent LECs. Section 251(f)(1), for instance, provides for exemption from the requirements in section 251(c) for rural telephone companies under certain circumstances. Moreover, section 251(f)(2) permits LECs with fewer than 2 percent of the nation's subscriber lines to petition for suspension or modification of the requirements in sections 251(b) or (c).

8. In the *Universal Service Order*,[9] we took steps, following recommendations of a Federal-State Joint Board,[10] to ensure that the support mechanisms necessary to maintain local rates at affordable levels are protected and advanced as local telecommunications markets become subject to the competitive pressures unleashed by the 1996 Act. Specifically, we established explicit support mechanisms to assist users in high-cost areas, low-income consumers, schools, libraries, and rural health care providers. The rules we adopted also provided for the funding of such support. Through the *Universal Service Order* and the *Access Charge Reform Order*, we set in place rules that identify and convert existing federal universal service support in the interstate high cost fund, the dial equipment minutes (DEM) weighting program, Long Term Support, Lifeline, and Link-up, to explicit federal universal service support mechanisms for both price cap and rate-of-return LECs. In the *Access Charge Reform Order*, we further directed that federal universal service support received by

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[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996)(*Local Competition Order*), Order on Reconsideration, CC Docket No. 96-98, 11 FCC Rcd 13042 (1996), *vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S.Ct. 879 (1998).

[8] 47 U.S.C. §§ 251 and 252.

[9] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd 8776 (1997) (*Universal Service Order*).

[10] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87 (1996).

incumbent LECs be used to reduce or satisfy the interstate revenue requirement otherwise collected through interstate access charges.[11]

9. In the *Access Charge Reform Order*, we began the process of reforming access charges for price cap LECs. There, we concluded that implicit subsidies embodied in the existing system of interstate access charges cannot be maintained indefinitely in their current form. We therefore modified the rules governing the interstate access charges of price cap LECs. First, we reformed the current rate structure to bring it more into line with cost-causation principles, phasing out significant implicit subsidies. Specifically, we reduced usage-sensitive interstate access charges by phasing out local loop and other non-traffic-sensitive (NTS) costs from those charges and directing price cap LECs to recover those NTS costs through more economically efficient, flat-rated charges. Second, we set in place a process to move the baseline rate level toward competitive levels by relying in part on emerging competition in local telecommunications markets, spurred by the adoption of the 1996 Act, to help identify the differences between the rates for interstate access services established by price cap LECs and those that competition would set. We also adopted revised rules governing the provision of transport services by both price cap and rate-of-return LECs. These rules included the reallocation of revenues presently recovered through the transport interconnection charge (TIC). These transport revisions responded to the decision of the United States Court of Appeals for the District of Columbia in *CompTel v. FCC*.[12] Finally, we deferred to a subsequent order the development of detailed rules for implementing the market-based approach for price cap LECs.

10. As noted in the *Access Reform NPRM*,[13] the Part 69 rules were designed to promote competition in the interstate, interexchange market by ensuring that all interexchange carriers (IXCs) would be able to originate and terminate their traffic over incumbent LEC networks at just, reasonable, and non-discriminatory rates. While the Part 69 rules expressly contemplated competition in the interexchange market, they were not designed to address the potential effects of competition in the local exchange and exchange access market. Indeed, these rules reflected conditions in the telecommunications marketplace in 1983, when the incumbent LEC was the monopoly provider of local exchange and exchange access services. In addition, the Part 69 rules were designed to be consistent with the jurisdictional separations rules that govern the allocation of incumbent LECs' expenses and investment between the interstate and state jurisdictions.[14] Consequently, the Part 69 access charge system likely reflects any jurisdictional cost misallocations mandated by our current separations rules. The Commission has initiated a related proceeding to examine our jurisdictional separations rules in light of the 1996 Act.[15]

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[11] *Access Charge Reform Order*, 12 FCC Rcd at 16148 ¶ 381.

[12] *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522 (D.C. Cir. 1996) (*CompTel v. FCC*).

[13] *Access Charge Reform*, CC Docket No. 96-262, Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry, 11 FCC Rcd 21354 (1996) (*Access Charge Reform NPRM*).

[14] *See* 47 C.F.R. Part 36.

[15] *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, 12 FCC Rcd 22120 (1997).

11. The Commission has recognized in prior rulemaking proceedings that, to the extent possible, costs of interstate access should be recovered in the same way that they are incurred, consistent with principles of cost-causation.[16] Thus, the cost of traffic-sensitive access services should be recovered through corresponding per-minute access rates. Similarly, NTS costs should be recovered through fixed, flat-rated fees. The Commission has not, however, always adopted rules consistent with this goal. As a result, rate-of-return LECs are required to maintain rate structures that have been widely criticized as economically inefficient. For example, even though the costs of the local loop do not vary with the amount of traffic carried by the loop, rate-of-return LECs are required to recover a portion of those costs through traffic-sensitive carrier common line (CCL) charges imposed on IXCs. Part 69 also mandates per-minute charges for local switching even though a significant portion of local switching costs is associated with ports and appears to be driven by the number of lines or trunks connected to the switch, not by the number of minutes of traffic routed by the switch. Rather than fostering efficient pricing and competition, these mandatory rate structures applicable to rate-of-return LECs inflate usage charges and reduce charges for connection to the network, in essence overcharging high-volume end users in order to reduce rates for low-volume end users.

12. Although these inefficient rate structures might have been sustainable in a local monopoly environment, the introduction of competition from providers operating their own network facilities or leasing network facilities as unbundled network elements may undermine these access rate structures. While the entry of competitors in many rate-of-return LEC service areas may be delayed due to the provisions of section 251(f), entry in these areas will likely occur in time. A competing provider of exchange access services entering a market can use its own facilities, lease unbundled network elements, if permitted, or use special access services of the incumbent LEC to target selectively the incumbent LEC's high-volume end users with efficiently-priced access service offerings. This places the rate-of-return LEC at a regulatorily-imposed disadvantage in competing for the interstate access service associated with high-volume end users, and jeopardizes the source of revenue that permits the rate-of-return LEC to cover its costs of providing service to low-volume end users. At the same time, these inefficient rate structures and implicit support flows create artificial impediments to any new entrants that might seek to serve the subsidized end users, because they must attempt to do so without the benefit of a subsidy. As a result, these access rate structures may inhibit the development of competition in providing access service to low-volume end users.

13. In Section I.B.2, we describe some of the operating characteristics of rate-of-return LECs and the regulatory measures that are in place today to assist such companies. In Section II, below, we outline and seek comment on the revisions we propose to the switched access rate structure for rate-of-return LECs. These proposed revisions affect common line, local switching, transport, the transport interconnection charge, and signalling system-7 (SS7) services. In Section III, we seek comment on some additional issues relating to the regulation of interstate access services of rate-of-return LECs. These include the reallocation of general support facility (GSF) costs to nonregulated billing and collection service, the treatment of marketing expenses, the proposed assessment of a presubscribed interexchange carrier charge (PICC) on interstate special access lines, and the streamlining of the procedures for introducing rate elements other than those required by the access charge rules.

[16] *E.g. Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, CC Docket No. 89-79, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4533 ¶ 50 (1991).

2. Rate-of-Return Overview

14. As we begin the process of access reform for rate-of-return LECs, it may be useful to identify some of the characteristics of rate-of-return LECs. They are not, however, a homogenous group, and their operating conditions vary significantly.

15. The largest rate-of-return LEC serves approximately one million access lines,[17] while the smallest ones serve only a few hundred lines. Rate-of-return LECs serve fewer than eight percent of the total access lines in the country, accounting for approximately nine percent of the revenues.[18] Some rate-of-return LECs receive more than 50 percent of their total revenues from interstate access revenues and universal service support, compared to just over 25 percent for LECs subject to price cap regulation. Many of these rate-of-return LECs serve rural areas, while others may serve suburban areas. Some of the larger rate-of-return LECs may serve both types of communities. They may be concentrated in one area, or may have operations in several states.

16. Rate-of-return LECs often have costs that are higher than those of their price cap brethren. Because they often serve areas that are less densely populated -- especially in rural areas -- they have longer loops and trunking facilities that increase their costs. They may also have higher installation costs due to difficult terrain. In addition, because rate-of-return LECs often serve smaller populations, they are not able to achieve the same economies of scale that larger carriers are able to achieve. In many instances, these LECs receive much of their revenue from one, or just a few, multi-line businesses in their service territory.

17. Rate-of-return LECs may file tariffs based on their own costs, or they may participate in the pooled National Exchange Carrier Association (NECA) common line or traffic sensitive tariffs. Participants in the NECA pools charge rates set by NECA tariffs and recover their costs, including a return on their investment. Some NECA pool members are compensated on the basis of "average schedules" rather than cost. Average schedule recovery reduces the cost to small rate-of-return LECs of conducting separate cost studies by providing compensation based on cost estimates derived from comparable cost companies.

18. Technological advances in the long distance world have created a situation in which distance is much less significant than it has been historically. This means that as long distance prices drop, companies that are heavy users of long distance services are free to locate in rural and suburban areas, stimulating economic growth in those areas.

19. Over the years, the Commission has addressed the cost of serving high-cost areas in a variety of ways. For example, the Commission has allocated more costs than might be reflected by relative use alone to the interstate jurisdiction through the separations process. Allowing incumbent LECs with high-cost loops to assign these additional costs to the interstate jurisdiction has kept local rates lower than they otherwise would have been. Through December 31, 1997, this form of high-cost support was recovered from the larger IXCs directly through a per-line charge. Additional switching

[17] At the end of 1996, Puerto Rico Telephone Company had 1.188 million subscriber lines. *See* Universal Service Fund Data Collection, CC Docket No. 80-286, Universal Service Fund 1996 Submission of 1995 Study Results by NECA, Oct. 1, 1996.

[18] *Id.*

costs of certain smaller incumbent LECs were also assigned to the interstate jurisdiction through the weighting of DEM.[19] Through December 31, 1997, these switching costs were recovered through interstate access charges. These mechanisms were replaced on January 1, 1998, by the universal service mechanisms established pursuant to section 254 of the 1996 Act.[20]

20. The Commission also kept the CCL rates charged by NECA common line pool members (many of which are high-cost companies) at levels that reflected what would have been the nationally averaged CCL rate if all incumbent LECs had been required to remain in the common line pool.[21] This program was known as long term support. Through December 31, 1997, the support for this program came from the incumbent LECs that left the NECA common line pool. This funding method was replaced by universal service support on January 1, 1998.

21. Finally, rural rate-of-return LECs and their customers also benefit from other policies. The universal service system will ensure that these carriers and customers are protected from undue rate increases. In addition, rural customers are protected by section 254(g) of the 1996 Act, which requires long-distance carriers to average their interstate toll rates.[22] Rural subscribers thus do not bear the full burden of the high cost of telephone access in rural areas.

II. RATE STRUCTURE MODIFICATIONS

A. Overview

22. In this section we propose to modify the switched access charge rules for rate-of-return LECs. We propose to adopt modifications similar to the ones we adopted for price cap LECs in our *Access Charge Reform Order*, unless differences in the market conditions or regulatory paradigms applicable to rate-of-return LECs and price cap LECs require different approaches to realize the underlying public interest objectives of access reform. We seek comment on rate structure rule changes for common line, local switching, and transport. We also seek comment on a proposal to phase out the transport interconnection charge, and on establishing rate structure rules for SS7 signalling services.

B. Common Line

1. Background

23. Common line (or loop) costs are the costs associated with the line connecting the end user's home or business with the LEC central office serving that premise. The costs of the loop are

[19] The jurisdictional separations process allocates local switching costs between the state and interstate jurisdictions on the basis of relative DEM. Until December 31, 1997, study areas with fewer than 50,000 lines received support from DEM weighting, which shifts additional local switching costs to the interstate jurisdiction by multiplying the carrier's interstate DEM by a factor as high as 3.0.

[20] *See Universal Service Order*, 12 FCC Rcd at 8813.

[21] *See id.*, 12 FCC Rcd at 9164-66.

[22] 47 U.S.C. § 254(g).

divided between the intrastate and interstate jurisdictions, with 25 percent of the costs assigned to the interstate jurisdiction.[23] The costs associated with providing the common line between the end user's premises and the LEC central office are NTS because they do not vary with the amount of usage, or minutes passing over the loop.[24] In the original *Access Charge Order*, the Commission found that recovering NTS costs through flat monthly charges imposed on end users by incumbent LECs would promote optimal utilization of telecommunications facilities.[25] The Commission decided at that time, however, to limit the amount that could be recovered directly from the end user through end user common line (EUCL) charges, also called subscriber line charges (SLCs).[26] Rate-of-return LECs' SLCs are limited to recovering the lesser of the actual cost of the interstate portion of the local loop, or $3.50 per month for residential and single line business customers, or $6.00 per month for multi-line business customers.[27] These SLC ceilings do not permit most LECs subject to rate-of-return regulation to recover their interstate-allocated common line costs through flat charges. The remaining common line costs are recovered through CCL charges, which are per-minute charges imposed on IXCs.[28]

24. The current CCL charge has been uniformly criticized by both incumbent LECs and IXCs because it discourages efficient use of the switched network and encourages customers to bypass the switched network for uneconomical reasons. The CCL charge is economically inefficient because it requires the LECs to recover a portion of their NTS costs through usage-sensitive charges. The IXCs, in turn, recover most or all of these costs from toll users in the form of per-minute charges, keeping toll rates artificially high and discouraging demand for interstate long distance services. High per-minute toll charges create support flows between different classes of customers. For example, low-volume toll users may not pay the full cost of their loops while high-volume toll users may contribute far more than the total cost of their loops. High-volume toll users, who include significant numbers of

[23] Through December 31, 1997, incumbent LECs with loop costs that exceeded 115% of the national average recovered a higher percentage of loop costs from the federal jurisdiction through a High Cost Fund that was funded entirely by IXCs based on the number of presubscribed lines. Beginning January 1, 1998, these costs are recovered through the new universal service support mechanisms. *Universal Service Order* at Sections VII and XIII.

[24] *See, e.g., Access Charge Reform Order*, 12 FCC Rcd at 15990-15996 ¶¶ 17-31; *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 5 FCC Rcd 6786, 6793 (1990) (*LEC Price Cap Order*); Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990); *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*); *aff'd sub nom. National Rural Telecom Ass'n v. FCC*, 988 F. 2d 174 (D.C. Cir. 1993).

[25] *MTS and WATS Market Structure*, CC Docket No. 78-72, Third Report and Order, 93 FCC 2d 241, 279 (1983) (*Access Charge Order*); *modified*, 97 F.C.C. 2d 682 (1983); *further modified*, 92 F.C.C. 2d 834 (1984), *aff'd in principal part and remanded in part sub nom. NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[26] *Access Charge Order*, 93 F.C.C. 2d at 284.

[27] *See* 47 C.F.R § 69.104.

[28] *See* 47 C.F.R § 69.105.

low-income customers, effectively support low-volume residential and multi-line business customers.[29] The rate structure currently in place for rate-of-return LECs, therefore, creates support flows between different classes of service and customers.

25. In addition, these implicit subsidies are economically inefficient. Without modifications to the current rate structure, new entrants, which are not subject to these rate structure requirements, would be in a position to target the access traffic of incumbent LECs' most profitable, high-volume end users based on regulatory requirements. A loss of profitable end users would increase the incumbent LECs' costs of providing access service to the rest of their end users.

2. Discussion

a. General

26. Modifications Adopted for Price Cap LECs. In the *Access Charge Reform Order*, the Commission directed price cap LECs to recover more of their common line NTS revenues directly from the end user by increasing the ceilings on SLCs for non-primary residential and multi-line business lines. For primary residential and single-line business lines, however, the Commission declined to increase the SLC ceiling above its existing $3.50 level because an increase in the SLC for these lines might make basic telecommunication service unaffordable for some consumers.[30] The Commission concluded, however, that these universal service concerns were not as great for non-primary residential and multi-line business lines, and, accordingly, adjusted the SLC ceilings on these lines to allow price cap LECs to recover more of their common line costs directly from the end users.[31] Specifically, the Commission permitted price cap LECs to adjust their SLC ceilings on non-primary residential and multi-line business lines to the level necessary to recover their average per-line interstate-allocated common line costs,[32] subject to an inflation-adjusted $9.00 ceiling.[33] The Commission stated that although there might be some disparity between the average SLCs in low- and high-cost areas, the $9.00 SLC ceiling would ensure that SLCs in high-cost areas would be "reasonably comparable" to SLCs in urban areas.[34]

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[29] *See* Robert W. Crandall, *Universal Service Subsidies and Consumer Welfare: Long-distance Access Charges*," Brookings Institution (April, 1997), Table 1 (showing that roughly 30 percent of households with income under $10,000 spend more on long-distance calls than do 50 percent of the households with income over $75,000).

[30] *Access Charge Reform Order*, 12 FCC Rcd at 16010-16011 ¶ 73.

[31] *Id.*, 12 FCC Rcd at 16011-16018 ¶¶ 74-87.

[32] When the maximum presubscribed interexchange carrier charge (PICC) assessed on primary residential lines, plus the maximum SLC on those lines, recovers the full amount of a price cap carrier's per-line common line price cap revenues, the carrier will base its SLC calculation on the average per-line common line revenues permitted under the price cap rules. *Access Charge Reform*, CC Docket No. 96-262, Order on Reconsideration, 12 FCC Rcd 10119 (1997).

[33] *Access Charge Reform Order*, 12 FCC Rcd at 16013-16014 ¶¶ 77-78. For multi-line business lines, the SLC was adjusted to recover the average per-line interstate-allocated common line costs beginning July 1, 1997.

[34] *Id.*, 12 FCC Rcd at 16014-16016 ¶¶ 79-83.

27. To ameliorate any possible adverse impact of an immediate SLC adjustment for non-primary residential lines, the Commission phased in adjustments in the SLC ceilings for these lines. On January 1, 1998, the monthly SLC for customers of price cap LECs was adjusted to the incumbent LEC's average per-line interstate-allocated costs, but may not exceed $1.50 more than the current SLC ceiling.[35] Annually thereafter, the monthly SLC ceiling for these lines will be adjusted for inflation and will increase by $1.00 per line, until the SLC ceiling for non-primary residential lines is equal to the ceiling permitted for multi-line business lines.[36]

28. In addition to adjusting the SLC ceiling for non-primary residential and multi-line business lines, the Commission adopted other common line rate structure modifications in the *Access Charge Reform Order* that will permit price cap LECs to transition, in a relatively short period of time, from a cost-recovery mechanism that recovers a significant portion of NTS common line costs through per-minute CCL charges to one that recovers these costs through flat-rated charges.[37] To the extent that SLC ceilings prevent price cap LECs from recovering their allowed common line revenues from end users, these LECs will recover the shortfall, subject to a maximum charge, through a presubscribed interexchange carrier charge (PICC). The PICC is a flat, per-line charge assessed on the end-user's presubscribed interexchange carrier.[38]

29. The PICC, which over time will shift revenue recovery from the per-minute CCL charges to a flat-rated charge, was designed to allow price cap LECs to recover the difference between revenues collected through the SLCs and the total revenue permitted for the common line basket. In order to provide price cap LECs and IXCs with adequate time to adjust to the new rate structure, the Commission adopted an approach that will gradually phase in the PICC over time. Specifically, effective January 1, 1998, PICCs for primary residential and single-line business lines are capped at $0.53 per month for the first year.[39] Beginning January 1, 1999, the ceiling on the monthly PICC on primary residential and single-line business lines will be adjusted for inflation and will increase by $0.50 per year until it equals one twelfth of the sum of the annual per-line common line revenues and residual interconnection charge revenues permitted under our price cap rules divided by the projected average number of local exchange service subscriber lines in use during such annual period, less the maximum primary residential and single-line business lines SLC computed pursuant to our rules.[40]

30. In addition, to the extent that the SLC ceilings on all lines and the PICC ceilings on primary residential and single-line business lines prevent recovery of the full common line revenues permitted by the price cap rules, the new rate structure permits price cap LECs to recover the shortfall

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[35] *Id.*, 12 FCC Rcd at 16014 ¶ 78.

[36] *Id.*

[37] *Id.*, 12 FCC Rcd at 16018-16026 ¶¶ 88-105

[38] *Id.*

[39] *Id.*, 12 FCC Rcd at 16020-16021 ¶ 94.

[40] *Id.; see also* 47 C.F.R. § 69.153(c); *Access Charge Reform*, CC Docket No. 96-262, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606 (1997).

through a flat-rated, per-line PICC on non-primary residential and multi-line business lines.[41] For the first year, the ceiling on the PICC will be $1.50 per month for non-primary residential lines and $2.75 per month for multi-line business lines.[42]

31. Beginning January 1, 1999, the PICC for price cap non-primary residential and multi-line business lines will be adjusted for inflation and will increase by a maximum of $1.00 and $1.50 per year, respectively, until price cap LECs recover all their permitted common line revenues through a combination of flat-rated SLC and PICCs.[43] As the PICC ceilings on primary residential and single-line business lines increase, the residual per-minute CCL charge will decrease until it is eliminated. After the residual per-minute CCL and residual TIC are eliminated, and as the PICC ceilings for primary residential and single-line business lines increase, price cap LECs will reduce their PICCs on non-primary residential and multi-line business lines by an amount that corresponds to the total increases in PICCs for primary residential and single-line business lines.[44] Reductions will be targeted to the PICCs on multi-line business lines until the PICCs for those lines are equal to the PICCs for non-primary residential lines. Thereafter, price cap LECs will apply the annual reductions to both classes of customers equally until the combined SLCs and PICCs for primary residential and single-line business lines recover the full average per-line common line revenues permitted under our price cap rules, and the additional PICCs on non-primary residential and multi-line business lines no longer recover common line revenues.[45] In the *Second Reconsideration Order*, we limited the application of the PICC that applies to multi-line business Centrex lines to one-ninth of the PICC plus the difference between the $9.00 SLC and the average interstate cost of the loop (if greater than $9.00), subject to the PICC ceiling. Where customers do not designate a presubscribed interexchange carrier, price cap LECs may collect directly from the customer the PICC that could otherwise be assessed against the presubscribed interexchange carrier.[46]

32. To the extent that PICCs do not recover an incumbent LEC's remaining permitted CCL revenues, price cap LECs will be allowed to recover any such residual common line revenues through per-minute CCL charges assessed on originating access minutes.[47] Price cap LECs may assess an originating CCL charge that, when added to the sum of local switching charges, the per-minute residual TIC, and any per-minute charges related to marketing expenses, does not exceed the sum of local switching charges, the per-minute CCL charge, and TIC assessed on originating minutes on

[41] *Access Charge Reform Order*, 12 FCC Rcd at 16022 ¶ 99.

[42] *Id.*

[43] *Id.*, 12 FCC Rcd at 16023 ¶ 101.

[44] *Id.*, 12 FCC Rcd at 16023-16024 ¶ 102.

[45] *Id.* As discussed in Sections II.D and III.B, the PICC will recover TIC revenues and certain marketing expenses in addition to common line revenues. Therefore, non-primary residential line and multi-line business PICCs may continue to recover non-common line revenues, even though SLCs and PICCs for primary residential and single-line business lines recover the average per-line common line revenues permitted under our price cap rules.

[46] *Id.*, 12 FCC Rcd at 16019-16020 ¶ 92.

[47] *Id.*, 12 FCC Rcd at 16022-16023 ¶ 100.

December 31, 1997. To the extent that the originating CCL rate does not recover all the CCL costs, price cap LECs may recover the shortfall through per-minute charges assessed on terminating minutes.[48]

33. In the *Access Charge Reform Order*, we reassigned certain costs currently recovered through the TIC to specified facilities charges.[49] For price cap LECs, those costs that remain (the "residual TIC") are recovered through the PICC. To the extent that the PICC ceiling prevents recovery of the entire residual TIC, the remaining portion will be collected through a per-minute residual TIC. As the ceilings on the PICCs increase, a larger percentage of the residual TIC will be recovered through the PICC.[50] Beginning with the annual access tariffs that became effective July 1, 1997, price cap productivity reductions reflected in the "X-Factor minus GDP-PI" formula are targeted to the per-minute residual TIC until it is eliminated. For price cap LECs, the per-minute TIC charge should be eliminated in two to three years. As with the residual CCL charge, any residual per-minute TIC will be placed on originating minutes unless the ceilings prevent the price cap LEC from recovering the total TIC revenues permitted under our price cap rules.

34. In our *Universal Service Order*, we set in place rules that will identify and convert existing federal universal service support in the interstate high cost fund, the DEM weighting program, Long Term Support (LTS), Lifeline, Link Up, and interstate access charges, to explicit competitively neutral federal universal service support mechanisms for both rural and non-rural LECs.[51] We stated that we will provide universal service support to non-rural LECs through a mechanism based on forward-looking economic costs beginning on January 1, 1999. Until the forward-looking mechanism takes effect on January 1, 1999, non-rural carriers will continue to receive high cost loop support at levels determined by existing universal service mechanisms.[52] The existing high-cost support mechanisms for rural LECs will remain unchanged until January 1, 2001, at the earliest.

35. Applicability to Rate-of-Return LECs. We tentatively conclude that we should adopt rate structure modifications for rate-of-return LECs that are similar to those that were adopted for price cap

[48] *Id.* As discussed in Sections II.C, II.D, and III.B below, the residual TIC, certain switching costs, and marketing expenses will be recovered through a combination of SLCs and PICCs.

[49] *Id.*, 12 FCC Rcd at 16076-16078 ¶¶ 217-223. These specified cost reallocations from the TIC to other access elements include: (1) SS7 costs to local switching or signalling rate elements; (2) central office equipment maintenance expenses primarily to the local switching category; (3) host-remote link costs not recovered by the current tandem-switched transport rates to the tandem-switched transport rate element; (4) effect of using actual minutes rather than 9,000 minutes in deriving tandem-switched transport rates to tandem switched transport transmission elements; (5) tandem costs transitioned to the tandem switching element; (6) effects of transport rate deaveraging to direct-trunked transport or tandem-switched transport rate elements; (7) multiplexing and trunk port costs to the tandem switching element for rate-of-return LECs; and (8) residual amounts of price cap LECs to facilities-based rate elements pursuant to a transition mechanism.

[50] The PICC increases will first recover any residual CCL charge until it is eliminated. Once the CCL charge is eliminated, through increases in the SLCs and PICCs, the PICC will recover residual TIC costs. *Id.*, 12 FCC Rcd at 16023-16024 ¶ 102.

[51] *Universal Service Order*, 12 FCC Rcd at 8903-8917 ¶¶ 232-251.

[52] *Id.*, 12 FCC Rcd at 8909-8910 ¶ 245.

LECs in the *Access Charge Reform Order.* We conclude that similar modifications are needed to remove implicit subsidies and ensure that charges more accurately reflect the manner in which the costs are incurred, thereby promoting competition. We acknowledge that certain rate-of-return LECs, especially those in rural and insular areas, face different market conditions and incur higher costs than do many price cap LECs. Smaller LECs serving more costly areas, however, will receive universal service support based on their embedded costs until the Commission, with the Universal Service Joint Board's assistance, develops an appropriate model to ensure that rural carriers receive support at a level that will enable them to provide supported services at affordable rates.[53] We tentatively conclude, therefore, that adopting similar modifications to those adopted in the *Access Charge Reform Order*, along with universal service support provided through the new universal service mechanisms, is a significant step that will improve the efficiency of the rate structures employed by rate-of-return LECs.

36. We seek comment on the applicability of the rate structure modifications adopted for price cap LECs to rate-of-return LECs. We recognize that certain rate-of-return LECs face higher operating and equipment costs attributable to the lack of economies of scale that result from low subscriber density and small exchanges that characterize rural areas. Adopting the same approach for rate-of return LECs, therefore, most likely will not align rates with costs as quickly as it will for price cap LECs. For many rate-of-return companies, especially those located in rural and insular areas, longer loops and difficult terrain result in average loop costs that significantly exceed the average loop costs of price cap LECs. NECA's average per-line interstate revenue requirement for 1997, for example, was more than $10.00 per line, per month, compared with a monthly per-line average of $6.10 for price cap LECs.[54] In addition, if we were to adopt the modifications described below that would direct rate-of-return LECs to recover certain switching, marketing, and residual transport interconnection costs through the common line SLCs and PICCs, per-line common line costs will increase further.[55]

37. Several entities argue that, because of the high common line costs and smaller economies of scale, if we were to adopt the same rate structure modifications that were adopted for price cap LECs, the SLCs for many rate-of-return carriers' multi-line business lines would reach the $9.00 ceiling immediately and would still not recover the average interstate-allocated common line costs for those lines.[56] Several entities have expressed concern that the immediate SLC increases to $9.00 will create a large disparity between SLCs charged by rate-of-return LECs and neighboring price cap

[53] *Id.*, 12 FCC Rcd at 8918 ¶ 254.

[54] *See Supporting Material filed with 1996 Annual Access Tariff Filing, filed with Commission on April 2, 1996 (1996 LEC Annual Access Tariff Forecast Data).*

[55] *See* Sections II.C (Local Switching), II.D (Transport and TIC), and III.B (Marketing Expenses) below.

[56] Effect of Price Cap Access Rules on NECA's Common Line Pool: NECA Model Descriptions and Assumptions at 3 (filed Dec. 5, 1997). NECA's calculations, which were submitted to the Common Carrier Bureau in response to a request for information, are based on several general assumptions, are informational, and do not represent NECA's position regarding how common line costs should be recovered. *Id.* at 2. *See also* United States Telephone Association (USTA) Data Assessing the Impact of Access Regulations for Price Cap Companies on Non-Price Cap LECs (filed Dec. 16, 1997).

LECs,[57] and that under the 1996 Act and applicable state laws, the lower-cost price cap carriers will be able to "cherry pick" the high volume business customers of the higher priced rate-of-return LECs. These entities urge the Commission to grant them pricing flexibility and propose that SLCs be set based on the national average or on the neighboring price cap LEC's average SLC.

38. A SLC ceiling that does not permit rate-of-return LECs to recover all of their interstate-allocated costs from end users would create a shortfall that would have to be recovered through the per-minute CCL charges or through an alternative recovery mechanism. The cost recovery mechanism for price cap LECs contemplates that price cap LECs will be able to recover all of their interstate-allocated common line costs through a combination of SLCs and PICCs, reducing the CCL charge to zero in a relatively short amount of time.[58] Indeed, we expect that for many of the price cap carriers, the CCL charge will be reduced to zero by the year 1999. The price-cap cost recovery mechanism also contemplates that the PICCs assessed on non-primary residential and multi-line business lines will be a short-term, temporary measure to recover residual common line costs until the SLCs and PICCs on primary residential and single-line business lines reach the level necessary to recover the per-line interstate-allocated common line costs for those lines.

39. If rate-of-return LECs were to implement the revised common line rate structure applied to price cap LECs, multi-line business PICCs and CCL charges would remain higher than those of price cap LECs for the foreseeable future, because rate-of-return LEC common line costs are significantly higher than those of price cap LECs. Under this scenario, the SLCs and/or PICCs for many rate-of-return LECs would have to be adjusted to a level that would be higher than the ceilings we adopted for price cap LECs if significant reductions in the CCL rate were desired. These points are illustrated by projections submitted by NECA and the United States Telephone Association (USTA). The data submitted by these parties show that implementing the same common line rate structure adopted for price cap LECs would result in the SLC for multi-line business customers reaching the $9.00 ceiling immediately.[59] Moreover, while the PICCs for multi-line businesses and non-primary residential lines would begin to decrease for price cap LECs by 1999 and 2000 respectively, the NECA and USTA projections suggest that the multi-line business PICCs of rate-of-return LECs would reach $7.07 and $7.64, respectively, by the year 2001 and continue to grow beyond that date. USTA's data suggests that with the SLCs and PICCs at their caps, the CCL per minute rate in 1998 (including common line costs, line port costs, and marketing expenses) would be $0.01 for originating minutes and $0.024 for terminating minutes, assuming a $0.01 ceiling on originating CCL rates (reflecting the existing requirement of section 69.106 of our rules). NECA's CCL calculation, which includes the residual TIC

[57] *Id.*

[58] In some cases the $9.00 SLC on non-primary residential and multi-line business lines will not recover all common line costs, including marketing and TIC costs recovered through the common line rate elements. In such cases the LECs may continue to assess a PICC on these lines to recover these residual costs.

[59] Effect of Price Cap Access Rules on NECA's Common Line Pool: NECA Model Descriptions and Assumptions at 3. NECA's calculations, which were submitted to the Common Carrier Bureau in response to a request for information, are based on several general assumptions, are informational, and do not represent NECA's position regarding how common line costs should be recovered. *Id.* at 2. *See also* USTA Data Assessing the Impact of Access Regulations for Price Cap Companies on Non-Price Cap LECs.

costs in addition to the three costs used by USTA, suggests that the CCL per minute rate would be \$0.0230 in 1998, if assessed equally on both originating and terminating minutes.[60]

40. In light of the apparent disparities that may be created by applying the same SLC and PICC ceilings to rate-of-return LECs that were adopted for price cap LECs, we ask interested parties to discuss how we should determine appropriate SLC ceilings. For example, should we adopt a ceiling that is based on the neighboring price cap LEC's average multi-line business SLC, or on the national average? In addition, in some cases, as the non-primary SLC cap increases, the disparity between the \$3.50 SLC for primary residential lines and the SLC for non-primary residential lines will most likely be greater for rate-of-return carriers than it is for price cap companies. Would this disparity warrant a different approach for rate-of-return carriers' non-primary residential lines than we adopted for price cap LECs?

41. Interested parties should discuss whether the PICC is an effective cost recovery mechanism for rate-of-return LECs' common line costs and, if so, to what extent the PICCs and CCL charges for rate-of-return LECs should be comparable to those of price cap LECs. If commenters believe that the plan we adopted in the *Access Charge Reform Order* would not produce the expected economic benefits for rate-of-return LECs and their customers, interested parties should submit alternative plans. For example, should we prescribe higher ceilings for PICCs that would permit rate-of-return LECs to reduce their CCL rates to levels comparable to those of price cap LECs? Alternatively, should we prescribe a maximum CCL charge and eliminate the PICC ceiling to allow rate-of-return LECs to recover the shortfall through flat-rated charges? In addition, in light of the higher common line costs incurred by many rate-of-return LECs, and because, if adopted, other modifications proposed below will require rate-of-return LECs to recover certain switching, marketing, and TIC costs through the common line recovery mechanism, we invite parties to discuss whether we should permit these carriers to recover relatively more of the common line revenue requirement through terminating minutes. Given that local switching per-minute rates will be reduced significantly by the inclusion of DEM weighting in universal service support, we ask interested parties to discuss whether a higher per-minute CCL charge in the short run is unsatisfactory.

42. Interested parties should also discuss the extent to which, for purposes of assessing SLCs and PICCs, residential and business lines should be treated differently. For example, should non-primary residential lines be assessed lower PICCs than multi-line business lines and phased in over time as we did for price cap LECs, or should we permit the SLCs for non-primary residential lines to increase more rapidly than for price cap LECs in order to allow carriers in high-cost areas to reduce their CCL charge more rapidly than would otherwise be possible with phased-in SLC increases? Alternatively, should a uniform PICC be applied to all non-primary residential and business lines to spread the revenue requirement evenly across these classes of customers?

43. In our recent *Access Charge Reform* Second Order on Reconsideration, we concluded that with respect to the PICC, Centrex customers should be treated similarly to PBX customers, because the two arrangements are functionally equivalent. Accordingly, we granted petitions by USTA, International Communications Association (ICA), and the County of Los Angeles that Centrex lines be

[60] The USTA and NECA data project CCL rates that would result using their assumptions. We note that our proposal for rate-of-return LECs recovers costs first through originating CCL rates, subject to a ceiling, after which terminating traffic is assessed to recover any residual.

assessed PICCs using a line-to-trunk equivalency ratio.[61] We adopted a 9:1 line-to-trunk ratio based on data provided by USTA because we found the 9:1 ratio to be reasonable and administratively simple.[62] We limited the PICC charges that may be assessed on IXCs serving Centrex customers to a line-to trunk equivalency basis except where the multi-line business SLC ceiling does not permit the recovery of all interstate-allocated loop costs from the end user. In those instances, a somewhat greater PICC -- one that includes the difference between the per-line loop cost and the multi-line business SLC cap -- will be assessed on Centrex lines.[63] We seek comment on the applicability of this approach and of the 9:1 ratio to rate-of-return LECs. Parties proposing different ratios should submit data supporting the ratio they propose.

44. We also seek comment on how the 1996 Act will affect the development of competition in areas served by small and rural rate-of-return LECs. Specifically, section 251(f)(1) provides an exemption for certain rural telephone companies from the duties of local exchange carriers enumerated in section 251(c), including but not limited to, the duties to interconnect, to provide access to network elements on an unbundled basis, and to resell telecommunications services.[64] Section 251(f)(2) provides a mechanism by which local exchange carriers with fewer than two percent of the nation's subscriber lines may petition the state for suspension or modification of some of the duties imposed by the Act on local exchange carriers.[65] We ask interested parties to discuss the impact of these sections and the development of competition as they relate to the rate structure and transition mechanism we are proposing.[66]

45. We also seek comment on whether we should adopt one approach for all rate-of-return LECs or whether our approach should vary depending on size, population density, topography, or other factors that may vary among rate-of-return LECs. Are there concerns that are specific to NECA pooling companies that warrant separate treatment? Interested parties should address the specific issues raised and submit proposals for modifications that are consistent with the goals of the 1996 Act. Interested parties should also propose a time frame for adopting modifications to the rate structure. Should modifications adopted become effective immediately or should they be phased in over time? Finally, parties should address the extent to which options proposed affect small business entities, including small incumbent LECs and new entrants.[67]

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[61] USTA Petition at 2-4; ICA Petition at 2-5; Los Angeles Petition at 1-11.

[62] *Access Charge Reform*, CC Docket No. 96-262, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606, 16617-18 ¶ 38 (1997).

[63] *Id.*, 12 FCC Rcd at 16617 ¶ 36.

[64] 47 U.S.C. § 251(f)(1).

[65] 47 U.S.C. § 251(f)(2).

[66] We note that the U.S. Court of Appeals for the Eighth Circuit has ruled that state commissions have the exclusive authority to determine whether to continue or terminate an exemption under subsection 251(f). *Iowa Utils. Bd. v. FCC*, 120 F.3d at 801.

[67] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

b. Assessment of SLCs and PICCs on Derived Channels

46. Modifications Adopted for Price Cap LECs. The *Access Charge Reform Order* established separate SLC rates for integrated services digital network (ISDN) service based on the NTS loop costs of Basic Rate Interface (BRI) and Primary Rate Interface (PRI) ISDN service. Based on the record, which indicated that the NTS loop costs of PRI ISDN service, excluding switching costs, reflect a cost ratio of approximately 5:1 compared to the NTS loop costs of single-channel analog service, the Commission established, effective July 1, 1997, a SLC rate for PRI ISDN service equal to five times the incumbent LEC's multi-line business SLC. Similarly, because the record showed that the NTS loop costs of BRI ISDN service, excluding NTS switching costs, when rounded to the nearest half SLC, reflect a 1:1 cost ratio relative to the NTS loop costs of single-channel analog service, the Commission set a SLC rate for BRI ISDN service equal to the price cap LEC's non-primary residential line SLC.[68]

47. Data submitted by the Bell Operating Companies (BOCs) in response to the 1995 ISDN SLC NPRM[69] indicated that line cards and trunk cards for PRI ISDN service in particular constitute a significant portion of the total NTS costs that are dedicated to the provision of service to the subscriber, and that ISDN line cards and trunk cards are many times more expensive than the cards used for standard analog service. We therefore directed price cap LECs to recover the difference between the cost of an ISDN line card and the cost of a line card used for basic, analog service through a separate charge assessed directly on ISDN end users.[70] Price cap LECs are also permitted to assess one PICC for BRI ISDN service and five PICCs for PRI ISDN service. The PICCs assessed on these lines are subject to the same ceilings and increases imposed on non-primary residential and multi-line business lines discussed above.[71] The *Access Charge Reform Order* limited these provisions to BRI and PRI ISDN service because the record did not contain sufficient information to enable the Commission to determine the relative NTS costs of other derived channel services.[72]

48. Applicability to Rate-of-Return LECs. We propose to adopt similar SLCs and PICCs for ISDN service offered by rate-of-return LECs. We seek comment on this conclusion and invite parties to comment on the impact that assessing SLCs and PICCs on ISDN lines will have on rate-of-return carriers and their customers. Parties should address whether the cost relationship between ISDN and analog service provided by rate-of-return LECs is similar to that of price cap LECs; if they believe it is not, they should submit specific data supporting their position. We recognize that our treatment of ISDN lines will depend on the other common line rate structure modifications discussed above. We therefore invite parties to discuss the relationship between proposed modifications to the common line rate structure and our tentative conclusion to treat rate-of-return LECs' ISDN lines in the manner discussed above.

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[68] *Access Charge Reform Order*, 12 FCC Rcd at 16032 ¶ 116.

[69] *End User Common Line Charges*, CC Docket No. 95-72, Notice of Proposed Rulemaking, 10 FCC Rcd 8565 (1995).

[70] *Access Charge Reform Order*, 12 FCC Rcd at 16032-33 at ¶ 117.

[71] *Id.* at ¶¶ 118-119.

[72] *Id.* at ¶ 120.

C. Local Switching

1. Background

49. The local switch connects subscriber lines both with other local subscriber lines and with dedicated and shared interoffice trunks. Local switching costs include the costs of analog or digital switching systems and the costs of line ports and trunk ports that connect subscriber lines and interoffice trunks, respectively, to the switch. The interstate portion of these costs is currently recovered through per-minute local switching charges levied on IXCs.[73]

50. The jurisdictional separations process currently allocates local switching costs between the state and interstate jurisdictions on the basis of relative DEM. Smaller incumbent LECs are able to charge lower prices for intrastate services because DEM weighting permits such LECs to assign intrastate switching costs to the interstate jurisdiction. This cost assignment is accomplished by multiplying the qualifying carrier's interstate DEM by a maximum factor of 3.0. Through December 31, 1997, these weighted local switching costs were recovered from IXCs through per-minute access charges for use of the local switch. Since January 1, 1998, rural carriers recover from the new universal service support mechanisms a subsidy corresponding in amount to that generated formerly by DEM weighting.[74] A rate-of-return LEC must exclude from its local switching interstate revenue requirement any high-cost support attributable to DEM weighting.[75]

2. Discussion

a. Dedicated Facilities

51. Modifications Adopted for Price Cap LECs. In the *Access Charge Reform Order*, the Commission found that a portion of the costs of the local switch do not vary with the level of traffic at the switch, but instead are related to the number of lines or trunks associated with the switch. The Commission concluded that when a line-side port is dedicated to a single customer or IXC, the cost recovery mechanism should be through a flat-rated charge on that customer or carrier. The Commission also required price cap LECs to assess a flat-rated trunk port charge on the purchaser of the dedicated trunk terminating at the port.[76] The Commission created a separate, traffic-sensitive rate element for shared trunk ports. Accordingly, the Commission directed that costs associated with line-side ports be removed from the local switching charge and be recovered through common line rates.[77]

[73] *Access Charge Reform Order*, 12 FCC Rcd at 16114-16117 ¶¶ 304-07.

[74] The definition of rural carrier is provided at 47 U.S.C. § 153(37).

[75] *Access Charge Reform*, Order on Reconsideration, 12 FCC Rcd 10119 ¶ 5 (1997).

[76] As used in this notice, the term "line port" or "line-side port" includes the line card, protector, and main distribution frame.

[77] In the *Access Charge Reform Order*, we found that it would be inconsistent with a Joint Board recommendation if we were to mandate, at this time, recovery of NTS local switching costs directly from universal service support mechanisms. *Access Charge Reform Order*, 12 FCC Rcd at 16038-16039 ¶ 132. Thus, we rejected proposals to recover the entire NTS portion of local switching costs from the new universal service support mechanisms. *Id.* We will not revisit this issue in this proceeding.

52. Common line charges will recover the cost of a line port used to provide basic, analog service, even when the end user has another form of service. For some services, such as ISDN, the cost of a line port is significantly more than the cost of a line port associated with a basic, analog line. Price cap LECs may assess a monthly flat-rated charge directly on end users of such services to recover the additional line port costs associated with those services.

53. The Commission required price cap LECs to conduct cost studies to determine separately the geographically-averaged portion of local switching costs that is attributable to line-side ports and dedicated trunk-side ports to support the port rates in their access tariffs. In addition, the Commission decided that the costs of DS1/voice-grade multiplexing associated with analog local switches should be recovered through the newly-created trunk port rate elements within the traffic sensitive basket.[78]

54. Applicability to Rate-of-Return LECs. We propose to require rate-of-return LECs to reassign all costs for line-side ports from the local switching category to the common line category. These costs would then be recovered through the rate structure adopted in response to our proposals in Section II.B, above. We seek comment on this proposal. We ask if there are any specific factors for rate-of-return LECs that would preclude our adoption of this rate structure change at this time. In addition, we propose to require rate-of-return LECs to conduct cost studies to determine the geographically-averaged portion of local switching costs that is attributable to the line-side ports and to trunk side ports, to be filed with the tariffs implementing these changes. We solicit comment on this cost study proposal. In the alternative, commenters are requested to suggest a substitute mechanism to identify and assign costs to line-side ports or to trunk-side ports.

55. We propose to require rate-of-return LECs to recover dedicated trunk port costs through a flat-rated trunk port charge assessed on the purchaser of the dedicated trunk terminating at the port. We also propose to establish a separate rate element through which rate-of-return LECs can recover on a flat-rated basis the additional costs of DS1/voice grade multiplexers required in conjunction with terminating dedicated trunks at analog switches that were reassigned from the TIC.[79] We ask whether the benefits to be gained from a more efficient, cost-causative rate structure outweigh the burden on rate-of-return LECs of establishing these new rate elements. In addition, we solicit suggestions as to what specific modifications of the Part 69 cost allocation rules we should make to implement any rate structure changes for dedicated local switching facilities.

56. For rate-of-return LECs, we propose to permit a separate, monthly, flat-rated, end-user charge to recover the amount by which the cost of a line port for ISDN, or the cost of a line port associated with other services, exceeds the cost of a line port for basic, analog service. We request comment on this proposal.

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[78] Analog switches require a voice-grade interface on the trunk-side of the end office switch, thereby requiring DS1 transport trunks to be demultiplexed into individual voice-grade circuits before being switched at analog end office switches. DS1/voice-grade multiplexers perform this function. A digital switch port includes the DS1/voice-grade multiplexing function.

[79] *Access Charge Reform*, Order on Reconsideration, 12 FCC Rcd 10119 (1997).

b. Shared Facilities

57. Modifications Adopted for Price Cap LECs. The *Access Charge Reform Order* required price cap LECs to recover the costs of shared local switching facilities, including the central processing unit, switching matrix, and shared trunk ports, on a per-minute basis, due to the difficulty in identifying the NTS and traffic-sensitive (TS) portions of the costs of these shared switching facilities, together with the companion difficulty in verifying the accuracy of incumbent LEC studies attempting to make this identification.[80] In addition, the Commission established an optional per message call setup charge,[81] concluding that the collection of a call setup charge should not be mandatory in cases where the price cap LEC determines that the costs of doing so exceed the benefits of establishing such a charge.[82] The Commission stipulated that a price cap LEC choosing to impose a call setup charge may not include in that charge any costs that it recovers through other local switching charges, through charges for dedicated SS7 facilities, or through other signalling charges.[83]

58. Applicability to Rate-of-Return LECs. In conformance with the decision reached in the *Access Charge Reform Order*,[84] we tentatively conclude that we will adhere to a per-minute rate structure for shared local switching facilities of rate-of-return LECs. Under this approach, the shared trunk ports and any associated DS1/voice grade multiplexers required at analog local switches will be assessed on a per-minute basis, separate from the charge for the switch itself. We seek comment on this tentative conclusion. In particular, we ask whether there are any factors inherent to rate-of-return LECs that should lead us to change this tentative conclusion.

59. We propose to permit, but not require, rate-of-return LECs to establish a call setup charge. Under this proposed revision to Section 69.106, a rate-of-return LEC could elect to establish a separate per-call setup charge assessed on IXCs for all originating interstate calls handed off to the IXC's POP, and on all terminating interstate calls that are received from an IXC's POP, whether or not a call is completed, because at this point the rate-of-return LEC's switches and signalling network have performed their functions and the incumbent LEC has incurred the full cost of its call setup function. We invite comment on this proposal for an optional call setup charge, including specific language to modify our Part 69 cost allocation rules to implement this rate structure change. Moreover, if a rate-of-return LEC elects to recover revenue requirements through a call setup charge, we tentatively conclude that this charge cannot overlap with any other local switching charges, with charges for dedicated SS7 facilities, or with other signalling charges. We request comment on our tentative conclusion prohibiting double recovery for call setup charges by rate-of-return LECs. Commenters also should suggest mechanisms that would prevent any double recovery for rate-of-return LECs.

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[80] *Access Charge Reform Order*, 12 FCC Rcd at 16040 ¶ 135.

[81] Call setup is the process of establishing a transmission path over which a phone call will be routed. As explained with regard to price cap LECs, call setup costs using SS7 are incurred primarily on a per-call rather than a per-minute basis.

[82] *Access Charge Reform Order*, 12 FCC Rcd at 16042 ¶¶ 138-39.

[83] *Id.*, 12 FCC Rcd at 16046 ¶ 147.

[84] *Id.*, 12 FCC Rcd at 16040 ¶ 135.

60. As stated in the *Access Charge Reform Order*, it would be extremely difficult to segregate the costs of the switch central processing unit and other traffic-sensitive costs into per-message and per-minute portions and to verify that the allocation has been done properly. Therefore, we propose to limit the costs that a rate-of-return LEC may recover through call setup charges to those associated with signalling. We request comment on this proposal to limit cost recovery to signalling. We seek comment on how call setup costs are affected by whether multifrequency (MF) signalling or SS7 signalling is employed. We also request estimates of the percentage of the total costs of a typical call that are represented by call setup costs.[85]

D. Transport Services and the Transport Interconnection Charge (TIC)

1. Background

61. Transport services carry interstate switched access traffic between the IXC's POP and the incumbent LEC end office that serves the end user customer. Transport charges are assessed for entrance facilities, direct-trunked transport, tandem-switched transport, and the TIC. We describe the pricing principles for the various segments below, including those changes adopted in the *Access Charge Reform Order* that are already applicable to rate-of-return LECs. In this section, we consider the remaining transport and TIC issues applicable to rate-of-return LECs.

62. Entrance facilities are dedicated LEC transmission facilities that carry interstate traffic between an IXC's POP and the LEC end office serving the POP (called the serving wire center or (SWC)). Direct-trunked transport facilities are dedicated trunks that carry an IXC's traffic from the LEC end office to the SWC,[86] or between any other two points the customer requests, without switching at an intervening switch. Part 69 requires incumbent LECs to recover the costs of entrance facilities and direct-trunked transport facilities through flat-rate charges assessed on IXCs. These charges may be distance-sensitive, with distance measured as airline miles between the POP and the SWC for entrance facilities or between the SWC and the end office for direct-trunked transport facilities.[87]

63. In contrast to direct-trunked transport, tandem-switched transport uses trunks that are shared among many IXCs and even the incumbent LEC itself to carry traffic between the LEC end office and a tandem switch, which is located between the SWC and the end office.[88] Tandem-switched service is provisioned in three parts: (1) transmission from the end office to the tandem over the shared circuits; (2) the tandem switching function itself; and (3) transmission from the tandem to the

[85] To facilitate our comparison of the estimates submitted, we request that commenters use an average call duration of 3.86 minutes, which we used as the call duration in our analysis in the *Access Charge Reform Order*, 12 FCC Rcd at 16041 n. 176.

[86] An end office local switch may also serve as a tandem switch with certain software upgrades. Therefore, the tandem switching office is also often an end office in its own right. An IXC typically locates its POP so that its SWC will be a large end office that can be, or has been, upgraded with additional trunking capacity to handle the IXC's traffic.

[87] *See* 47 C.F.R. §§ 69.110 and 69.112.

[88] We note that dedicated entrance circuits carry traffic between the IXC POP and the serving wire center, whether the IXC uses direct-trunked transport or tandem-switched transport.

SWC over circuits dedicated to specific IXCs. An IXC may use tandem-switched transport either as its primary form of transport in lieu of direct-trunked transport, or to carry traffic that overflows from its direct-trunked transport facilities at peak periods.

64. Today, IXCs have the option of selecting between two pricing plans for tandem-switched transport -- the unitary rate structure or the three-part rate structure. The unitary rate structure assesses IXCs a per-minute rate for the transmission between the SWC and the end office based on the airline miles between those two points. A separate tandem switching charge is also assessed on IXCs under the unitary rate structure. The three-part structure includes: (1) a per-minute charge for transport of traffic over common transport facilities between the LEC end office and the tandem office; (2) a separate per-minute charge for use of the tandem switch; and (3) a flat-rated charge for transport of traffic over dedicated transport facilities between the SWC and the tandem switching office. Mileage, if applicable, is measured between the end office and the tandem switch and between the tandem switch and the SWC. The *Access Charge Reform Order* directed all incumbent LECs, including rate-of-return LECs, to discontinue the unitary rate structure option, effective July 1, 1998. Beginning with tariffs effective on that date,[89] all incumbent LECs, including rate-of-return LECs, must provide tandem-switched transport under the three-part rate structure.

65. The TIC reflects costs allocated to interstate transport that could not be recovered through facility-based transport rates under the interim transport rate structure rules. Through December 31, 1997, the TIC was a per-minute charge assessed on switched interstate access traffic. The *Access Charge Reform Order* directed incumbent LECs, including rate-of-return LECs, to make specified cost reallocations from the TIC to other facilities-based rate elements, thereby reducing the amount in the TIC. As explained in the *Second Reconsideration Order*, since January 1, 1998, incumbent LECs, including rate-of-return LECs, have not been allowed to assess the facilities-related portion of the per-minute TIC on any switched minutes of a competitive access provider that does not use the transport facilities of the incumbent LEC. Incumbent LECs, however, may recover the non-facilities-related portion of the per-minute TIC on all minutes switched by the incumbent LEC at its end office, without regard for whether those minutes are carried on incumbent LEC or competitive transport facilities.[90]

2. Discussion

a. Miscellaneous Tandem-Switched Transport Issues

66. Modifications Adopted for Price Cap LECs. Since January 1, 1998, price cap LECs have been required to assess a flat-rated trunk port charge on the purchaser of the dedicated trunk

[89] Since January 1, 1998, price cap LECs have assessed separate multiplexing and port charges.

[90] *Access Charge Reform*, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606 (1997) (*Second Reconsideration Order*)("Under this rule, interexchange traffic that is switched at the incumbent LEC's local switch, but that is not transported on the incumbent LEC's local transport network, will be subject to the per-minute TIC, less the portion of the per-minute TIC attributable to incumbent LEC tandem-switching and tandem-switched transport transmission costs that have not yet been reallocated to facilities-based rate elements." *Id.*, 12 FCC Rcd at 16626 ¶ 61; *Access Charge Reform*, Erratum (rel. Nov. 13, 1997).

terminated at the trunk port on the SWC side of the tandem switch.[91] Price cap LECs also have been required to establish separate rate elements for multiplexing equipment on each side of the tandem switch to recover multiplexer costs reassigned from the TIC.[92] The rates for multiplexers on the SWC side of the tandem switch are flat rated because they are dedicated to a single IXC.[93] The rates for the multiplexers on the end office side of the tandem switch are per-minute charges because these multiplexers are shared among all users of common transport.[94] These provisions cover DS1/voice grade multiplexers used with analog tandem switches,[95] as well as other multiplexers that are not included in transport rates.

67. Applicability to Rate-of-Return LECs. We tentatively conclude that we should require rate-of-return LECs to recover the costs of trunk ports used to terminate dedicated trunks on the SWC side of the tandem switch through flat-rated charges assessed on the purchaser of the dedicated trunk terminated at that port. This is consistent with the treatment given similar ports on the local switch and is consistent with the dedicated nature of these ports. To ease the burdens of implementing this unbundling, we propose to permit rate-of-return LECs to use the dedicated trunk port rates at the local switch to establish this unbundled charge. With regard to shared facilities at the tandem switch, we tentatively conclude that there is no need to create a separate charge for shared trunk ports on the end-office-side of the tandem switch because this trunk port cost is included in the charge for the tandem switch and there is no reason to charge separately for shared trunk ports in the tandem switching context. We request comment on this analysis and our tentative conclusions.

68. We also propose to require rate-of-return LECs to establish multiplexing elements to recover the multiplexer costs associated with the tandem switch that were reassigned to tandem switching from the TIC in the *Access Charge Reform First Reconsideration Order*.[96] To simplify the implementation process for rate-of-return LECs, we propose to permit them to use multiplexer rates already established in their special access tariff for similar multiplexers. We request comment on these proposals.

b. Outstanding TIC Issues for Rate-of-Return LECs

69. Modifications Adopted for Price Cap LECs. Although the Commission reallocated certain costs from the TIC to facilities-based rates in the *Access Charge Reform Order*, not all costs could be reallocated to other elements based on the record in that proceeding. Two additional mechanisms will gradually eliminate the residual TIC for price cap LECs. First, price cap LECs will recover revenues now recovered through the TIC through the PICC once the CCL charge has been eliminated, as discussed in Section II.b, above. Second, price cap LECs will target price cap productivity (X-factor)

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91 *Access Charge Reform Order*, 12 FCC Rcd at 16056 ¶ 174.

92 *Id.*, 12 FCC Rcd at 16054 ¶ 167.

93 *Id.*, 12 FCC Rcd at 16054 ¶ 167 and 16056 ¶ 171.

94 *Id.*, ¶¶ 167 and 172.

95 *Id.*, 12 FCC Rcd at 16055-56 ¶¶ 171-72.

96 *Access Charge Reform*, Order on Reconsideration, 12 FCC Rcd 10119 (1997).

adjustments to the trunking basket's PCI, and therein to the TIC SBI, thus reducing the amounts recovered through the residual TIC and effectively spreading those residual TIC revenues among the universe of access services.

70. Applicability to Rate-of-Return LECs. As with price cap LECs, the reallocation of costs from the TIC to other rate elements will not remove all of the costs from the TIC. For the reasons stated in the *Access Charge Reform Order,* we believe it is important to eliminate the TIC to avoid its potential to adversely affect competitive developments in the marketplace. Therefore, we propose to incorporate the residual TIC in the common line pricing structure just as we did for price cap LECs. This will put in place a process that will, at different times for different rate-of-return LECs, begin the process of transitioning TIC costs to other rate elements. We ask for comment on this analysis and on our proposal to adopt a similar rate structure to that we employed for price cap LECs.

71. We ask parties to address whether there are additional causes of costs remaining in the residual TIC for rate-of-return LECs that have not been identified previously that would justify further reallocations of costs from the TIC. Parties identifying such costs should indicate the other element(s) to which these additional costs should be reallocated. We invite parties to comment on whether any public policy reasons would support retaining some costs of rate-of-return LECs in the residual TIC indefinitely. We ask parties to address the competitive implications of waiting for completion of a Joint Board review of separations procedures to determine which, if any, of the costs in the TIC reflect the higher cost of providing transport services in less densely populated areas, as compared with the costs underlying transport rates that were derived from special access rates.[97]

72. The *Access Charge Reform Order* phases the TIC down by targeting certain PCI reductions to reducing the TIC. We ask whether any comparable mechanism exists for rate-of-return LECs that would eliminate the residual TIC in a reasonable time. We ask commenters whether spreading the residual TIC proportionately over the other access elements in a manner comparable to that of targeting price cap productivity reductions to the TIC would be practical. We seek comment on what would be a reasonable time in which to accomplish such a reallocation. We ask parties supporting such an approach to propose cost allocation rules to implement their approach. Parties presenting data to quantify amounts in the residual TIC should include sufficient detail to permit the Commission and interested parties to evaluate the procedures used and to adjust the results, if necessary, to address concerns raised by the record. We seek comment on how these approaches affect small business entities, including small incumbent LECs and new entrants.[98]

E. SS7 Signalling

1. Background

73. Signalling System Seven (SS7) is the international standard network protocol currently used to establish and close transmission paths over which telephone calls are carried. SS7 networks consist of high-speed packet switches and dedicated circuits that are separate from, but interconnected with, the telecommunications networks over which telephone calls are carried. Incumbent LECs typically use SS7 networks for three purposes: (1) for call setup; (2) to retrieve information from

[97] *Access Charge Reform Order,* 12 FCC Rcd at 16078-16080 ¶¶ 224-27.

[98] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

remote databases, such as billing information that must be obtained from the line information database (LIDB) used to validate calling cards or for collect calling, or information identifying the designated long-distance carrier of a toll-free 800 service subscriber; and (3) to transmit the information and instructions necessary to provide custom local area signalling services (CLASS features), such as automatic call back and caller ID.[99] An SS7 network includes several primary components -- signalling points, signal transport links, and dedicated lines used for access to an incumbent LEC's signalling network (signal links).

74. Under the interim transport rate structure, rate-of-return LECs charge IXCs and other access customers a flat-rated charge assessed on a per-line basis for the use of dedicated facilities to connect to the incumbent LECs' signalling networks.[100] This rate element is composed of two subelements: a flat-rated signalling link charge for the dedicated network access line (DNAL), and a flat-rated signalling transfer point (STP) port termination charge. The majority of other SS7 signalling costs are not recovered through SS7 facility-based charges, including those for: (1) switching messages at the local STP; (2) transmitting messages between an STP and the incumbent LEC end office switch or tandem switch; and (3) processing and formulating signal information at an end office or tandem switch. Thus, once the reallocation of SS7 costs included in the TIC is completed, most, if not all, of these costs will presumably be recovered through the local switching charge. In contrast, incumbent LECs typically assess a per-query charge for the retrieval of information and the transmission of the query to and from databases, such as the 800 and LIDB databases.[101]

75. On March 27, 1996, the Common Carrier Bureau granted Ameritech a waiver to restructure the manner in which it recovers its SS7 costs.[102] The rate structure established by Ameritech pursuant to that waiver recovers costs through four unbundled charges for the various functions performed by SS7 networks: (1) signal link; (2) STP port termination; (3) signal transport; and (4) signal switching.

2. Discussion

76. Modifications Adopted for Price Cap LECs. In the *Access Charge Reform Order*, the Commission decided to continue the existing rate structure for SS7 costs and to permit price cap LECs to adopt the rate structure for SS7 services that we approved in the *Ameritech SS7 Waiver Order*.[103]

77. Applicability to Rate-of-Return LECs. We propose to continue the existing rate structure for SS7 cost recovery by rate-of-return LECs, with an optional structure to reflect Ameritech's SS7 rate structure. We invite comment on this proposal. We also solicit additional, alternative SS7 rate

[99] *See Ameritech Operating Companies Petition for Waiver of Part 69 of the Commission's Rules to Establish Unbundled Rate Elements for SS7 Signalling*, Order, 11 FCC Rcd 3839, 3841 (Com. Car. Bur. 1996) (*Ameritech SS7 Waiver Order*).

[100] 47 C.F.R. § 69.125. This flat-rated charge is called "dedicated signalling transport" in the Part 69 rules.

[101] *See, e.g.*, 47 C.F.R. § 69.120 (defining the LIDB per-query charge).

[102] *Ameritech SS7 Waiver Order*, 11 FCC Rcd at 3839.

[103] *Access Charge Reform Order*, 12 FCC Rcd at 16089-90 ¶¶ 252-53.

structure proposals for rate-of-return LECs. Any comments on this issue should include an assessment of the expense of requiring rate-of-return LECs to install equipment in their networks for metering SS7 traffic. Would the streamlined waiver petition procedure we propose below be preferable as a means to address alternative SS7 rate structures proposed by rate-of-return LECs?

78. We recognize that some call setup is still performed using in-band, MF signalling, rather than out-of-band signalling systems such as SS7. SS7 signalling may be less prevalent for rate-of-return LECs than for price cap LECs. Any determination we make concerning a SS7 rate structure for rate-of-return LECs could be affected by the extent that rate-of-return LEC networks use SS7. We also ask parties to comment on the need for revisions to the cost allocation rules in Part 69 to accommodate the provision of SS7 signalling in accordance with the provisions of the Ameritech SS7 waiver.

III. OTHER ISSUES

A. General Support Facilities Costs

1. Background

79. In its *Part 69 Conformance Order*, the Commission amended Part 69 to reapportion, *inter alia*, General Support Facilities (GSF) investment and expenses among the existing access elements, the interexchange category, and the billing and collection category. The GSF investment category includes assets that support other operations, such as land, buildings, vehicles, as well as general purpose computer investment accounted for in USOA Account 2124.[104] Some rate-of-return LECs use general purpose computer equipment to provide nonregulated billing and collection services to IXCs.[105] The costs of providing interstate billing and collection service are not, however, treated as nonregulated in the Part 64 cost allocation process. Instead, nonregulated interstate billing and collection costs are identified through the Part 36 and Part 69 cost allocation process.

80. Section 69.307 of the Commission's rules states that GSF investment is to be allocated among the billing and collection category, the interexchange category, and the access elements based on the amount of Central Office Equipment (COE), Cable and Wire Facilities (CWF), and Information Origination/Termination Equipment (IO/T) investment allocated to each Part 69 category.[106] This rule appears on its face to provide for an allocation of GSF investment to billing and collection. Because

[104] *See* 47 C.F.R. § 36.111.

[105] In 1986, the Commission found that the market for billing and collection service was sufficiently competitive that it was not necessary to require LECs to provide that service as a tariffed common carrier service. The Commission did not, however, pre-empt state regulation of billing and collection services. *See Detariffing of Billing and Collection Services*, CC Docket No. 85-88, 102 FCC 2d 1150 (1986) (*Billing and Collection Detariffing Order*), *recon. denied*, 1 FCC Rcd 445 (1986). The Commission later decided to treat billing and collection costs as regulated for accounting purposes because it found that such treatment was less likely to misallocate these costs between the interstate and intrastate jurisdictions. *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, Report and Order, CC Docket No. 86-111, 2 FCC Rcd 1298, 1309 (1987).

[106] 47 C.F.R. § 69.307(c).

no COE, CWF, or IO/T investment is allocated to the billing and collection category, no GSF investment, and thus no portion of general purpose computer investment, is allocated to the billing and collection category. Similarly, because expenses related to GSF investment are allocated in the same manner as GSF investment, no GSF expenses (including expenses related to general purpose computers) are allocated to billing and collection. To the extent that rate-of-return LECs' costs are underallocated to the billing and collection category, rate-of-return LECs' regulated services are recovering costs associated with unregulated services through interstate access charges.

2. Discussion

81. Modifications Adopted for Price Cap LECs. In the *GSF Order,* we modified Section 69.307 of our rules to require the use of a general expense allocator to apportion the interstate share of Accounts 2111 (Land), 2121 (Buildings), 2123 (Office equipment), and 2124 (General purpose computers) between: (1) the billing and collection category and (2) all other elements and categories.[107] To determine the amount to be assigned to the billing and collection category, we applied a modified "Big Three Expense Factor" allocator to the interstate investment recorded in these four accounts.[108] In developing the modified allocator, we excluded any account or portion of an account that is itself apportioned based on the apportionment of GSF. Any GSF investment in Account 2110 not allocated to the billing and collection category will be apportioned among the access elements and the interexchange category using the current investment allocator. The interstate portion of Account 6120 (General Support Expenses) will continue to be apportioned among all elements and categories, including billing and collection, based upon the allocation rules contained in section 69.401(a)(2).[109]

82. Applicability to Rate-of-Return LECs. We tentatively conclude that we should modify section 69.307 of our rules for rate-of-return LECs to allocate GSF costs related to billing and collection services to the billing and collection category. As with price cap LECs, we propose to use a general allocator to accomplish this GSF reassignment to the billing and collection category. For those rate-of-return LECs that maintain accounts below the summary account level, we propose to apply the same general allocator to the interstate portion of the four accounts to which it was applied for price cap LECs. Because certain small rate-of-return LECs do not maintain accounts below the summary account level, we seek comment on what adjustments, if any we should make to the allocation procedures to reflect this difference. Therefore, it would be helpful if parties would comment on how many rate-of-return LECs use general purpose computers to provide billing and

[107] *Access Charge Reform*, Third Report and Order, CC Docket No. 96-262, 12 FCC Rcd 22430 (1997).

[108] The "Big Three Expenses" are the following combined expense groups: Plant Specific Operations Expense (Accounts 6110, 6120, 6210, 6220, 6230, 6310, and 6410), Plant Nonspecific Operations Expenses (Accounts 6510, 6530, and 6540), and Customer Operations Expenses (Accounts 6610 and 6620). The "Big Three Expense Factors" are calculated separately by each LEC as the ratio of (a) the sum of the Big Three Expenses apportioned to each element or category (*e.g.*, the B&C category) to (b) the sum of the combined Big Three Expenses. 47 C.F.R. § 69.2 (e) and (f). Thus, for a given LEC, the numerator in the ratio to be applied to a particular account would be the sum of the amounts allocated by that LEC from each of its Big Three Expenses to its nonregulated B&C category and the denominator would be the sum of its Big Three Expenses. The LEC then uses its Big Three Expense Factor to accomplish various allocations under Part 69. *Id.* at 22432 ¶ 6 n. 8.

[109] *Id.* at 22443-44 ¶ 35.

collection services. We also invite parties to identify any changes that should be made to other access elements as a result of any changes we may make to the GSF allocation procedures. Finally, parties should also address the extent to which these approaches affect large and small rate-of-return LECs differently and how small business entities, including small incumbent LECs and new entrants, will be affected.[110]

B. Marketing Expenses

1. Background

83. Prior to 1987, incumbent LEC marketing expenses were allocated between the interstate and intrastate jurisdictions on the basis of local and toll revenues. In 1987, a Federal-State Joint Board recommended that interstate access revenues be excluded from the allocation factor used to apportion marketing expenses between the interstate and intrastate jurisdictions because marketing expenses are not incurred in the provision of interstate access services.[111] The Commission agreed with the Joint Board's recommendation and adopted new procedures that allocated marketing expenses in Account 6610 on the basis of revenues, excluding access revenues.[112] In petitions for reconsideration of the Commission's order, several incumbent LECs argued that the revised separations treatment of marketing expenses would result in a significant, nationwide shift of $475 million in revenue requirements to the intrastate jurisdiction.[113] On reconsideration, the Commission adopted an interim allocation factor for marketing expenses that includes access revenues, pending the outcome of a further inquiry by the Joint Board.[114]

2. Discussion

84. The Commission concluded in the *Access Charge Reform Order* that price cap LECs' marketing costs that are not related to the sale or advertising of interstate switched access services are not appropriately recovered from IXCs through per-minute interstate switched access charges.[115] We concluded that recovering these expenses from end users instead of from IXCs is consistent with principles of cost-causation to the extent that LEC sales and advertising activities are aimed at selling

[110] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[111] *Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board*, CC Docket No. 86-297, Recommended Decision and Order, 2 FCC Rcd 2582 (1987) (*Marketing Expense Recommended Decision*).

[112] *MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board*, CC Docket Nos. 78-72, 80-286, and 86-297, Report and Order, 2 FCC Rcd 2639 (1987).

[113] *MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 78-72, 80-286, and 86-297, Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 2 FCC Rcd 5349, 5350 (1987) (*Marketing Expense Reconsideration Order*).

[114] *Marketing Expense Reconsideration Order*, 2 FCC Rcd at 5353. *See also* 47 C.F.R. § 36.372.

[115] *Access Charge Reform Order*, 12 FCC Rcd at 16121 ¶ 319.

retail services to end users, and not at selling switched access services to IXCs.[116] Accordingly, pending a recommendation by the Joint Board on a new method of apportioning marketing costs between the intrastate and interstate jurisdictions, the Commission directed price cap LECs to recover marketing expenses allocated to the interstate jurisdiction from end users on a per-line basis.[117]

85. Specifically, price cap LECs are to recover the revenues related to the Account 6610 marketing expenses by increasing the SLCs for multi-line business and non-primary residential lines, subject to the SLC ceilings.[118] To the extent the SLC ceilings prevent full recovery of these amounts, price cap LECs were required to recover marketing costs through equal increases on the PICCs for non-primary residential and multi-line business lines, subject to the PICC ceilings.[119] In the event the PICC ceilings prevent full recovery of these expenses, any residual marketing expenses may be recovered through per-minute charges on originating access service, subject to the ceiling placed on originating minutes.[120] Finally, to the extent price cap LECs cannot recover their remaining marketing expenses through per-minute charges on originating access, any residual may be recovered through per-minute charges on terminating access service.[121] To the extent marketing expenses will be recovered through the SLC, they shall not be included in the base factor portion or considered common line revenues.[122]

86. We tentatively conclude that, for the reasons set forth for price cap LECs in the *Access Charge Reform Order*, rate-of-return LECs' marketing costs should be recovered through the common line recovery mechanism. We seek comment on this conclusion and ask parties to propose a mechanism comparable to the separate basket created for price cap LECs that will remove marketing expenses from access charges assessed by rate-of-return LECs. Any proposal we adopt will require changes to our Part 69 cost allocation rules. We therefore invite parties to provide language for an amendment to our Part 69 cost allocation rules that affect the recovery of these marketing expenses through the common line cost recovery mechanism discussed above.

C. Special Access

1. Background

87. As a result of the new rules adopted in the *Access Charge Reform Order*, certain multi-line businesses will be paying higher SLCs than they did previously. Similarly, as the PICCs are phased

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[116] *Id.*, 12 FCC Rcd at 16121 ¶ 320.

[117] *Id.*, 12 FCC Rcd at 16121 ¶ 319.

[118] Price cap LECs were permitted to recover these expenses after performing the appropriate downward exogenous adjustments to the PCIs in the common line, traffic sensitive, and trunking baskets. *Access Charge Reform Order*, 12 FCC Rcd at 16122-16123 ¶ 324.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

in, IXCs initially will be required to pay higher PICCs for a multi-line business end-user compared to the PICC paid for a primary residential end user or a single-line business end-user. In contrast, users of special access do not pay a SLC. Furthermore, under special access, IXCs do not incur the same local access charges that are incurred by end users using switched access. In light of the most recent changes to the charges incurred by multi-line businesses, including the higher SLC and the new multi-line business PICC, the Commission noted in the *Access Charge Reform Order, Further Notice of Proposed Rulemaking* (*FNPRM*) that it may be cost effective for some multi-line businesses that are currently using switched access to purchase instead special access lines.[123]

88. In the *FNPRM*, we tentatively concluded that we should permit price cap LECs to assess a PICC on special access lines to recover revenues for the common line basket.[124] The special access PICC would be no higher than the PICC that an incumbent LEC could charge for a multi-line business line, and the special access PICC would not recover TIC or marketing expenses.[125] We noted that this proposal would be temporary in nature and would be phased out as the single-line PICC is phased in. We tentatively concluded that allowing LECs to impose such special access PICCs would be necessary to facilitate the transition from current per minute CCL charges to the flat-rate PICC.[126]

89. Parties responding to our *FNPRM* unanimously opposed assessing PICCs on special access lines.[127] Several of these parties argued that concerns that PICCs assessed on multi-line business lines will lead to migration from switched access to special access are unfounded.[128] Others argued that migration might be a problem but that special access PICCs are not the solution.[129]

2. Discussion

90. We invite parties to comment on whether, if we apply a PICC to special access services offered by price cap LECs, we should apply a PICC to special access services offered by rate-of-return LECs. Parties should comment on the impact of PICCs on special access lines if, as projected by NECA and USTA, the PICCs on rate-of-return LECs' multi-line business lines remain in place for a considerably longer time than they do for price cap LECs'.[130] To the extent parties advocate assessing PICCs on special access lines, we seek comment on how special access connections should be counted

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[123] *Access Charge Reform*, CC Docket No. 96-262, Further Notice of Proposed Rulemaking, 12 FCC Rcd 15982, 16154 ¶ 401(1997) (*FNPRM*).

[124] *Id.*, 12 FCC Rcd at 16155 ¶ 403.

[125] *Id.*

[126] *Id.* at ¶ 404.

[127] *See, e.g.*, Sprint Comments at 2; Ad Hoc Comments at 8-15; America Online Comments at 8-9; AT&T Comments at 5.

[128] *See, e.g.*, Sprint Comments at 2; Ad Hoc Comments at 8-15; AT&T Comments at 6; America Online Comments at 8-9.

[129] *See, e.g.*, BA/NYNEX Comments at 1-4, Reply at 1; USTA Comments at 1-2; MCI Comments at 7.

[130] *See* Section II.B above.

for purposes of assessing a "per line" PICC. Parties should also address the extent to which our proposal affects large and small LECs differently and how small business entities, including small incumbent LECs and new entrants, will be affected.[131]

D. Part 69 Cost Allocation Rules

91. Under the Part 36 separations rules, certain costs of the incumbent LEC network are assigned to the interstate jurisdiction.[132] For rate-of-return LECs, the Part 69 cost allocation rules allocate these interstate costs among the various access and interexchange services.[133]

92. Throughout this notice, we request comment on the need for changes to our cost allocation rules in conjunction with specific proposals to revise certain rate structure provisions of the Part 69 rules. We now ask whether we should make any other modifications at this time to our cost allocation rules for rate-of-return LECs to accommodate any of those changes, or to update the rules in other respects. Parties making such suggestions should be specific about the reasons the change is needed and include proposed language for revising the cost allocation rules.

E. Modification of New Services Requirement

93. Rate-of-return LECs currently must file a petition pursuant to Section 1.3 of the Commission's rules to request a Part 69 waiver for the establishment of one or more new switched access rate elements to accommodate a new service offering to switched access customers.[134] Courts have interpreted the good cause showing specified in Section 1.3 to require petitioners to demonstrate that special circumstances justify a departure from the general rule and that such a deviation will serve the public interest.[135]

94. Prior to adoption of the *Access Charge Reform Order*, we streamlined the Part 69 waiver process for a price cap LEC wishing to offer a new service.[136] This procedure significantly expedites the prior waiver process pursuant to Section 1.3, and became effective on June 30, 1997.[137] Under Section 69.4(g), a price cap LEC must file a petition that demonstrates one of two criteria: (1) that another LEC has previously obtained approval to establish identical rate elements and that the original petition did not rely upon a competitive showing as part of its public interest justification, or (2) that the new rate elements would serve the public interest.

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[131] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[132] *See* 47 C.F.R. Part 36.

[133] *See* 47 C.F.R Part 69.

[134] 47 C.F.R. § 1.3.

[135] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

[136] *Price Cap Performance Review for Local Exchange Carriers*, Third Report and Order, 11 FCC Rcd 21354, 21490 ¶¶ 309-310 (1996).

[137] *See* 47 C.F.R. § 69.4(g).

95. We tentatively conclude that we should adopt the streamlined petition provisions of Section 69.4(g) for rate-of-return LECs. We request comment on this tentative conclusion. In addition, we request suggestions as to any manner in which the procedures or standards of Section 69.4(g) should be modified for rate-of-return LECs. Parties should comment, for instance, on whether a showing of prior approval should be limited to petitions granted to other rate-of-return LECs.

IV. PROCEDURAL ISSUES

A. *Ex Parte* Presentations

96. This Notice of Proposed Rulemaking is a permit-but-disclose proceeding and is subject to the permit-but-disclose requirements under Section 1.1206(b) of the rules, 47 C.F.R. § 1206(b), as revised. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[138] Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b), as well.

B. Paperwork Reduction Act

97. This notice contains either proposed or modified information collections. On April 1, 1997, the Office of Management and Budget (OMB) approved many of our proposed information collection requirements in accordance with the Paperwork Reduction Act.[139] The OMB made one recommendation, suggesting that we try "to minimize the number of new filings that firms must create in order to be compliant with the rules adopted . . . allowing firms to use many of the filings they must create in order to demonstrate that they meet the Telecommunications Act of 1996 requirements for provision of inter-LATA services within their operating regions." The Commission will consider carefully whether the number of required new filings can be minimized by relying to the greatest extent possible on those filings referenced by OMB in its approval. In addition, we request specific suggestions of other methods to minimize the number of required new filings.

98. As part of our continuing effort to reduce paperwork burdens, we invite the general public and OMB to take this opportunity to comment on any additional information collections contained in this notice, not previously approved by OMB, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this notice; OMB comments are due 60 days from the date of publication of this notice in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

[138] *See* 47 C.F.R. § 1.1206(b)(2), as revised.

[139] Notice of Office of Management and Budget Action, OMB No. 3060-0760 (Apr. 1, 1997). On June 12, 1997, OMB approved additional information collections adopted pursuant to the *Access Charge Reform Order*. Notice of Office of Management and Budget Action, OMB No. 3060-0760 (June 12, 1997).

C. Initial Regulatory Flexibility Act Analysis

99. As required by the Regulatory Flexibility Act (RFA),[140] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the proposals suggested in this Notice of Proposed Rulemaking. Written public comments are requested on the IRFA. Comments and reply comments must be identified by a separate and distinct heading as responses to the IRFA and must be filed on or before July 17 or August 17, 1998 respectively. Parties should address the extent to which our proposals affect large and small incumbent rate-of-return LECs differently and how small business entities, including small incumbent LECs and new entrants, will be affected. The Commission's Office of Public Affairs, Reference Operations Division, will send a copy of this Notice of Proposed Rulemaking, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.[141] In addition, the Notice of Proposed Rulemaking and IRFA (or summaries thereof) will be published in the Federal Register.[142]

100. Need for, and Objectives of, the Proposed Rules. The Commission's access charge rules for rate-of-return LECs were adopted at a time when interstate access and local exchange services were offered on a monopoly basis. We seek to revise the Commission's access charge rules for LECs subject to rate-of-return regulation to make the rules consistent with the pro-competitive, deregulatory policies contemplated by the Telecommunications Act of 1996. In the 1997 *Access Charge Reform Order*,[143] we focused on setting in motion the forces of competition and deregulation in local markets served by incumbent local exchange carriers subject to price cap regulation. In this Notice, we propose to modify our rate structure requirements, to the extent possible, to permit rate-of-return LECs to recover costs in a manner that more accurately reflects the way those costs are incurred, identify implicit subsidies, and reduce subsidies by recovering more costs from the cost causer, thereby sending more accurate pricing signals to both consumers and competitors, and facilitating the transformation from a regulated to a competitive marketplace. Specifically, we propose to reduce usage-sensitive interstate access charges by diminishing local loop and other non-traffic sensitive costs and directing rate-of-return LECs to recover those non-traffic sensitive costs through more economically efficient, flat-rated charges.

101. Legal Basis. The proposed action is authorized by Sections 1-4, 201-205, 251, 254, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 251, 254, 303(r) and 403.

102. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply. The Regulatory Flexibility Act directs agencies to provide a description of and an estimate, where feasible, of the number of small entities that may be affected by proposed rules, if

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[140] *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[141] *See* 5 U.S.C. § 603(a).

[142] *See id.*

[143] *Access Charge Reform Order*, 12 FCC Rcd at 15982.

adopted.[144] The Regulatory Flexibility Act generally defines the term "small entity " as having the same meaning as the term "small business."[145] The term "small business" has the same meaning as the term "small business concern" under the Small Business Act (SBA).[146] Under the SBA, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration.[147]

103. Because the small rate-of-return LECs that would be subject to these rules are either dominant in their field of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definition of "small entity" and "small business concerns."[148] Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small rate-of-return LECs.[149] Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small rate-of-return LECs within this analysis and use the term "small incumbent rate-of-return LECs" to refer to any rate-of-return LECs that arguably might be defined by SBA as "small business concerns,"[150] including consideration of any adverse impact of the rules we adopt and consideration of alternatives that may reduce adverse impacts on such entities.[151]

104. The Small Business Administration has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, Except Radiotelephone) to be small telecommunications entities when they have no more than 1,500 employees at the holding company level.[152] We invite interested parties to discuss the number of telecommunications providers, if any, that can be considered "small entities" within the meaning of the Regulatory Flexibility Act, and

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[144] 5 U.S.C. § 603(b)(3).

[145] 5 U.S.C. § 601(6).

[146] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the Regulatory Flexibility Act, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3). The Small Business Administration definition, therefore, is used unless the Commission has developed one or more definitions that are appropriate to its activities.

[147] 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

[148] *See Local Competition Order*, 11 FCC Rcd at 16144-45 ¶¶ 1327-30.

[149] *See id.*, 11 FCC Rcd at 16150 ¶ 1342.

[150] *See* 13 C.F.R. § 121.210 (SIC 4813). *See also* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987).

[151] Since the time of the Commission's 1996 decision in the *Local Competition Order*, 11 FCC Rcd at 16144-45, 61 FR 45476 (August 29, 1996), the Commission has consistently addressed in its regulatory flexibility analyses the impact of its rules on incumbent LECs.

[152] 13 C.F.R. § 121.201.

whether there is any reason to establish different requirements for small telecommunication providers. Below, we discuss the total estimated number of telephone companies falling within these categories and the number of small businesses in each category, and we then attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

105. The most reliable source of information regarding the total numbers of certain common carriers nationwide appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS).[153] According to data in the most recent report, there are 3,459 interstate carriers.[154] These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.[155]

106. Telephone Companies Affected. The United States Bureau of the Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone service, as defined therein, for at least one year.[156] This number contains a variety of different categories of carriers, including incumbent LECs, interexchange carriers (IXCs), competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, personal communication service (PCS) providers, covered specialized mobile radio (SMR) providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small rate-of-return incumbent LECs because they are not independently owned or operated.[157] For example, a PCS provider that is affiliated with an IXC having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent rate-of-return LECs because some of them are not independently owned or operated.

107. Wireline Carriers and Service Providers Affected. The Small Business Administration has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. According to the Small Business Administration's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.[158] The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[159] All but 26 of the 2,321 non-radiotelephone

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[153] FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997) (*Telecommunications Industry Revenue*).

[154] *Id.*

[155] *See* 13 CFR § 121.201, SIC code 4813.

[156] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities, Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

[157] *See generally* 15 U.S.C. § 632(a)(1).

[158] 13 C.F.R. § 121.201, SIC Code 4812.

[159] *1992 Census, supra*, at Firm Size 1-123.

companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small rate-of-return LECs. We do not have data on the number of carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the Small Business Administration's definition. Consequently, we estimate that there are fewer than 2,295 small telephone communications companies other than radiotelephone companies that may be affected by the proposed rules, if adopted.

108. Incumbent Local Exchange Carriers Affected. Neither the Commission nor the Small Business Administration has developed a definition of small providers of local exchange service.[160] The most reliable source of information regarding the number of incumbent LECs nationwide appears to be the report that we compiled from the 1997 Telecommunications Relay Service (TRS) Fund worksheets and the Universal Service Fund (USF) worksheets of September, 1997. According to our most recent data, 1,376 companies that provided interstate telecommunications service as of June 30, 1997 reported that they were engaged in the provision of local exchange service.[161] Although it seems certain that some of these carriers are not independently owned or operated, have more than 1,500 employees, or are subject to price cap regulation, we are unable at this time to estimate with greater precision the number of rate-of-return LECs that would qualify as small business concerns under the Small Business Administration's definition. Consequently, we estimate that there are fewer than 1,376 small rate-of-return LECs that may be affected by the proposals in this notice, if adopted. We seek comment on this estimate.

109. Interexchange Carriers. Neither the Commission nor the Small Business Administration has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under the Small Business Administration rules is for telephone communications companies other than radiotelephone (wireless) companies.[162] According to the most recent *Telecommunications Industry Revenue* data, 143 carriers reported that they were engaged in the provision of interexchange services.[163] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of interexchange carriers (IXCs) that would qualify as small business concerns under the Small Business Administration's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the proposed rules, if adopted..

110. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements. It is not clear whether, on balance, proposals in this notice would increase or decrease

[160] The closest applicable definition under Small Business Administration rules is for telephone telecommunications companies other than radiotelephone (wireless) companies. Standard Industrial Classification (SIC) Code 4813.

[161] Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *Carrier Locator: Interstate Service Providers*, Figure 1 (Nov. 1997).

[162] 13 CFR § 121.201, SIC code 4813.

[163] *Telecommunications Industry Revenue*, Figure 2.

incumbent rate-of-return LECs' administrative burdens. With respect to rate-of-return LECs, we believe that the rate structure reforms that we propose in Sections II and III would require at least one, and possibly several, additional filings, and may reduce some administrative burdens. For example, if we adopt the streamlined petition provisions of 47 C.F.R. § 69.4(g) for introduction of new services by rate-of-return LECs, we expect that this would decrease some administrative burdens of rate-of-return LECs.

111. If the rule revisions we propose are adopted, we estimate that these rate-of-return LECs would make one tariff filing to bring their access charges into compliance with the revised rules. We are unable to estimate how extensive each tariff filing would be, on average. We estimate that, on average, it would take approximately two hours per page for the rate-of-return LEC to prepare each tariff filing, at a cost of $35 per hour in professional level and support staff salaries. If we decide to require the filing of a cost study for determining local switching costs attributable to line-side ports and to trunk-side ports, these rate-of-return LECs would file one cost study. We estimate that, on average, it would take approximately 400 hours for the rate-of-return LEC to prepare a cost study, at a cost of $30 per hour in professional level and support staff salaries. Compliance with these tariff and cost study requirements may compel the use of engineering, technical, operational, accounting, billing, and legal skills.

112. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered. In Sections II and III, for the subscriber line charge, the carrier common line charge, non-traffic sensitive switching costs, the transport interconnection charge, a special access PICC, and general purpose computer costs, we have sought comment on how a number of proposals would affect small entities. These proposals could have varying positive or negative impacts on small entities, including small rate-of-return LECs and new entrants. We seek comment on these proposals and urge that parties support their comments with specific evidence and analysis.

113. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules. None.

D. Notice of Proposed Rulemaking Comment Filing Dates and Procedures

114. Pursuant to applicable procedures set forth in Section 1.399 and 1.411 *et seq.* of the Commission's Rules, 47 C.F.R. Sections 1.399, 1.411 *et seq.*, interested parties may file comments with the Secretary, Federal Communications Commission, Washington D.C. 20554, no later than **July 17, 1998.** Interested parties may file replies no later than **August 17, 1998.** To file formally in this proceeding, participants must file an original and twelve copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus 16 copies must be filed. In addition, parties must file two copies of any such pleading with the Competitive Pricing Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington D.C. 20554.

115. Parties submitting diskettes should submit them along with their formal filings to the Commission's Office of the Secretary. Submissions should be on a 3.5 inch diskette formatted in an DOS PC compatible form. The document should be saved into WordPerfect 5.1 for Windows format. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comment), docket number, and date of submission.

116. Parties may also file informal comments electronically via e-mail <rateofreturn@fcc.gov>. Only one copy of electronically-filed comments must be submitted. The docket number of this proceeding must appear in the subject line, CC Docket No. 98-77. The subject line must also disclose whether an electronic submission is an exact copy of formal comments. Your full name and U.S. Postal Service mailing address must be included in your submission.

117. Comments and replies must comply with Section 1.49 and all other applicable sections of the Commission's Rules. We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and replies. Comments and replies must also clearly identify the specific portion of this Notice of Proposed Rulemaking to which a particular comment or set of comments is responsive. If a portion of a party's comments does not fall under a particular topic listed in the Table of Contents of this notice, such comments must be included in a clearly labelled section at the beginning or end of the submission.

118. Written comments and reply comments by the public on the proposed and/or modified information collections are due July 17 or August 17, 1998 respectively. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after the date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein must be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and must be submitted to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

V. ORDERING CLAUSES

119. Accordingly, IT IS ORDERED, pursuant to Sections 1-4, 201-205, 251, 254, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 251, 254, 303(r) and 403, that NOTICE IS HEREBY GIVEN of the rulemaking described above and that COMMENT IS SOUGHT on these issues.

120. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

EXHIBIT 7

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
	)	

ORDER ON RECONSIDERATION

Adopted: June 19, 2003 **Released:** June 25, 2003

By the Commission:

I. INTRODUCTION

1. On July 21, 2000, One Call Communications, Inc. d/b/a Opticom ("One Call") filed a petition for reconsideration and clarification[1] of the Commission's *CALLS Order*.[2] In its petition, One Call sought to apply to payphone lines the common line cost recovery mechanism for single-line business and residential subscriber lines established in the *CALLS Order*, rather than the cost recovery mechanism applicable to multi-line business lines. In this Order, we grant One Call's request to reconsider the treatment of payphone lines under our access charge rules. Specifically, we adopt a rule exempting payphone lines from the PICC, and we deny One Call's request that payphone lines be treated as single-line business lines for purposes of assessment of the subscriber line charge ("SLC").

II. BACKGROUND

A. Access Charges for the Common Line Before CALLS

2. Prior to the *Access Charge Reform First Report and Order*,[3] interstate common line costs were recovered first through SLCs, which are flat charges assessed directly on end users by LECs. Under

[1] We note that One Call was not the only party to file a petition for reconsideration. The other petitions for reconsideration will be addressed in a separate order.

[2] *Access Charge Reform*, CC Docket No. 96-262, Notice of Proposed Rulemaking, 14 FCC Rcd 16872 (1999) (*CALLS NPRM*); Public Notice, 15 FCC Rcd 23204 (2000) (*CALLS Public Notice*); Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (*CALLS Order*), *aff'd in part, rev'd and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001). A comment or reply to the *CALLS NPRM* is identified as Comments or Reply, respectively. A comment or reply to the *CALLS Public Notice* is identified as Supplemental Comments or Supplemental Reply, respectively. A list of parties filing comments or replies to One Call's Petition for Reconsideration and Clarification, and how they are identified in this Order, is attached as Appendix A.

[3] *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) (*Access Charge Reform First Report and Order*), *aff'd sub. nom. Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998).

the Commission's rules, SLCs are capped to ensure affordability.[4] To the extent the SLC caps prevented LECs from recovering all of their interstate common line costs through the SLCs, LECs recovered the difference from interexchange carriers ("IXCs") through per-minute charges called carrier common line charges ("CCLCs"). The CCLC is an inefficient way to recover the costs associated with common line, however, because those costs do not vary by usage.[5]

3. In the *Access Charge Reform First Report and Order*, therefore, the Commission created the PICC in order to phase out the CCLC.[6] Through the PICC, price cap LECs were permitted to recover from the end user's presubscribed IXC for each line a portion of the interstate common line revenues permitted by price cap regulation. The IXC typically passed on the PICCs to its end users to pay for the PICCs assessed by the LEC.[7] The Commission established three different types of PICCs. The first one was assessed on primary residential and single-line business lines, and was used to recover the revenues that were not recovered through the residential subscriber line charge. Similarly, the other two types of PICCs, assessed on non-primary residential and multi-line business lines, were used first to recover the revenues that were not recovered for those lines through their respective SLCs. In addition, however, to the extent primary residential and single-line business SLCs and PICCs failed to recover all the interstate common line revenue requirements for those lines, the non-primary residential and multi-line business line PICCs helped recover the shortfall.[8] In order to phase out the CCLCs, the *Access Charge Reform First Report and Order* allowed the maximum amount recoverable through the PICCs to rise each year. The gradual increase in the primary residential and single-line business PICC cap was designed to result in the eventual recovery of common line revenues incurred for each line wholly through the combination of the SLC and PICC for that line, thereby eliminating the temporary subsidy provided to each of those lines by non-primary residential and multi-line business lines.[9]

B. *CALLS Order*

4. Both One Call and Operator Communications, Inc. ("OCI") filed comments in response to the *CALLS NPRM* and *CALLS Public Notice*, arguing that the application of the proposed cost recovery mechanism for single-line business lines to payphone lines would further the Commission's policy goals.[10] In response, other parties asserted that the payphone issues were collateral to the issues raised in the *CALLS NPRM* and *CALLS Public Notice*.[11] In May 2000, the Commission adopted the *CALLS Order*, which, *inter alia*, raised SLC caps for primary residential and single-line business lines through a series of step increases, while simultaneously eliminating the PICC for all residential and single-line business

[4] *CALLS Order*, 15 FCC Rcd at 12986-87, paras. 65-66.

[5] *Access Charge Reform First Report and Order*, 12 FCC Rcd at 15998-99, para. 37.

[6] *Id.* at 15999, 16004-06, paras. 38, 55-60.

[7] Where the end user does not presubscribe to an IXC, the price cap LEC can bill the end user directly for the PICC. *Access Charge Reform First Report and Order*, 12 FCC Rcd at 16019, para. 92.

[8] *Id.* at 16022, para. 99.

[9] *Id.* at 16021, para. 94. Under the approach adopted in the *Access Charge Reform First Report and Order*, if the price cap LEC's common line revenue requirement is $6.00 per line, eventually the PICC on single-line business and primary residential lines would increase to $2.50. This amount, together with the $3.50 SLC cap then in place for those lines, would recover the LEC's total per-line common line revenue requirement. At the time the PICC reached $2.50 for those lines, the PICCs for non-primary residential and multi-line business lines would be wholly eliminated, because the SLCs for those lines could recover the entire per-line common line revenue requirement.

[10] *See* One Call Comments at 9-11; OCI Comments at 6-9.

[11] *See* Coalition Supplemental Reply at 50; GTE Supplemental Reply at 43.

lines.[12] Consequently, under current Commission rules, a price cap LEC collects its common line revenue requirement from SLCs, PICCs, and CCLCs in a cascading fashion. First, a price cap LEC collects common line revenue from the SLCs it charges to end users. To the extent the SLC cap prevents the full satisfaction of the common line revenue requirement through the SLC, a carrier next collects its common line revenue from multi-line business PICCs assessed on IXCs. To the extent the cap on the multi-line business PICC prevents the full satisfaction of the common line revenue requirement through the PICC, the carrier may collect its common line revenue requirement from CCL charges on IXCs.

5. The *CALLS Order* did not address the concerns raised by One Call or OCI in their comments. In its petition for reconsideration and clarification, One Call asks that the Commission fold the PICCs assessed on payphone lines into the SLC, "consistent with the cost causative mechanism adopted for other [single-line business] lines in the *CALLS Order*."[13] One Call proposes to implement its modification by imputing the PICC to the payphone provider (*i.e.*, the price cap LEC would "collect" the PICC for a LEC-owned payphone from the LEC's payphone unit), or by changing the Commission's rules to treat payphone lines as single-line business lines for purposes of both the SLC and PICC.[14]

III. DISCUSSION

A. Administrative Challenge of One Call's Petition

6. As a threshold matter, because this Order considers the merits of One Call's petition, we dispose of One Call's contention that the Commission acted arbitrarily and capriciously, in violation of section 553 of the Administrative Procedure Act,[15] in failing to address One Call's comments in the *CALLS Order*.[16] Because this Order considers the merits of One Call's petition and comments, to the extent there was any past error in this regard it has been corrected. Although some parties argue that One Call's (and OCI's) comments in response to the *CALLS NPRM* were outside the scope of the rulemaking,[17] we find that considering the impact on payphone providers of the proposal at issue in the *CALLS NPRM* is a logical outgrowth of that proposal. This is demonstrated by several facts. First, the proposal specifically addressed the PICCs and SLCs.[18] Second, the *CALLS NPRM* broadly requested comment on any aspect of the proposal.[19] Third, the *CALLS NPRM* also invited commenting parties to propose alternative plans to the proposal.[20] Given this finding, we turn now to the issues raised by these proceedings.

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[12] 15 FCC Rcd at 12991, para. 76.

[13] *See* Petition at 2. OCI filed comments in support of One Call's petition.

[14] *See* Petition at 13-14. One Call also argues that assessing the PICC for LEC-owned payphones on the 0+ carrier, but on the 1+ carrier for independent payphones, is discriminatory and improperly subsidizes Bell Operating Company ("BOC") payphone operations in violation of section 276 of the Act. *See id.* at 10-12; 47 U.S.C. § 276. "The Act" refers to the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). Because we find in this Order that all payphone lines should be exempted from the PICC, we need not address this assertion.

[15] 5 U.S.C. § 553.

[16] *See* Petition at 6-9.

[17] *See* Coalition Opposition at 10.

[18] *CALLS NPRM*, 14 FCC Rcd at 16880-84, Appendix A at § 2.1.

[19] *Id.* at 16872, para. 1.

[20] *Id.* at 16874, para. 5.

B. The PICC for Payphone Lines

7. As set forth below, we find that payphone lines should be exempt from the PICC. Parties argue that assessing the PICC on payphone lines is inconsistent with section 276 of the Act.[21] Section 276(a) has two relevant components. First, it prohibits any BOC from subsidizing "its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations."[22] Second, it prohibits discrimination in favor of BOC payphone service.[23] In furtherance of section 276(a), the Commission has determined that payphone line rates should be set according to the cost-based new services test.[24] The multi-line business PICC, however, does not recover the costs of the lines on which it is assessed. Rather, it recovers revenues that would be recovered through charges on residential and single-line business lines, if those charges were not capped.[25] Thus, because the PICC is not cost-based, it does not comply with the new services test.

8. The Coalition argues that section 276 is designed to prevent BOCs from subsidizing their payphone services from exchange or exchange access services, but PICCs are paid to the LEC, not the LEC's payphone unit.[26] We agree that PICC revenues are not used to subsidize the LECs' payphone service, but to cover the LECs' common line revenue shortage created by the cap on the SLC for residential and single-line business lines.[27] Nevertheless, we note that, in adopting section 276(b), Congress desired to "promote the widespread deployment of payphone services to the general public."[28] We believe that this is consistent with a universal service function that payphones provide to those who cannot otherwise afford telephone service. We conclude that it is bad policy to impose a non-cost-based charge, such as the PICC, on payphone lines because doing so may limit the deployment of payphone services that serve these important functions. Given Congress's stated intent to preserve the availability of payphones, the universal service functions payphones provide, and that the PICC does not reflect costs incurred for the provision of payphone service, we find it desirable to exempt payphone lines from the PICC. Although this Order establishes that payphone lines are exempted from the PICC on a going-forward basis, we make no finding with respect to the application of PICCs to payphone lines prior to the effective date of this Order.[29]

9. Therefore, price cap LECs that still assess the PICC on multi-line business lines must adjust their rates in their October 1, 2003 tariff filings to reflect that the PICC no longer applies to payphone lines. Price cap LECs may recover the revenue previously recovered through assessing the

[21] *See* Petition at 10-11.

[22] 47 U.S.C. § 276(a)(1).

[23] 47 U.S.C. § 276(a)(2).

[24] *See, e.g., First Payphone Order*, 11 FCC Rcd at 20614, para. 146; *Wisconsin Public Service Commission, Order Directing Filings*, CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2063, para. 39 (2002) (*Wisconsin Payphone Order*). The new services test is a cost-based test that sets the direct cost of providing the new service as a price floor and then adds a reasonable amount of overhead to derive the overall price of the new service. *Wisconsin Payphone Order*, 17 FCC Rcd at 2055, para. 12.

[25] *See CALLS Order*, 15 FCC Rcd at 13004, para. 106.

[26] *See* Letter from William W. Jordan, Vice President, Federal Regulatory, BellSouth, to Magalie Roman Salas, Secretary, FCC (filed Apr. 6, 2001) at 1-2.

[27] *See CALLS Order*, 15 FCC Rcd at 13004, para. 106.

[28] 47 U.S.C. § 276(b)(1).

[29] *Cf., Communications Vending Corp. of Arizona v. Citizens Communications Co.*, 17 FCC Rcd 24201 (2002) (payphone providers are not end users for purposes of the SLC).

PICC on payphone lines by adjusting their multi-line business PICCs. To the extent the PICC cap prevents such recovery, price cap LECs may recover the revenue shortfall through CCLCs.

C. The Appropriate SLC for Payphone Lines

10. We reject One Call's proposal that payphone lines be treated as single-line business lines for the purpose of assessing the SLC.[30] Although the multi-line business PICC represents a subsidy flowing from multi-line business lines to residential and single-line business lines, the multi-line business SLC is a cost-based charge.[31] The SLCs are the primary method by which incumbent LECs recover their interstate common line costs,[32] and the SLC caps ensure that the SLCs never recover more than the carrier's per-line permitted revenues.[33] Moreover, our rules prevent a LEC from subsidizing one class of customers through the SLCs assessed on another class of customers.[34] Thus, the assessment of multi-line business line SLCs on payphone lines does not result in any subsidy to other lines. In addition, to prevent a BOC from overrecovering its costs for a payphone line, the BOC must reduce the monthly per-line charge for payphone lines determined in a state proceeding under the new services test by the amount of the SLC.[35] If we were to treat payphone lines as single-line business lines, however, the amount by which a LEC's per-line revenue requirement exceeds the single-line business line SLC cap, which is lower than the multi-line business SLC cap, would then need to be recovered through increased PICCs on multi-line businesses.[36] This would result in multi-line business lines subsidizing LEC-owned payphone lines in contravention of the mandate of section 276(a) against such subsidization.[37]

11. Petitioner argues that often there is only one payphone at a given location.[38] The definition of single-line business, however, requires that a single-line business line be the only line the subscriber takes from a particular company.[39] Given that the payphone provider, not the premises owner, is the subscriber, almost all, if not all, payphone lines cannot meet this definition. Certainly LEC-owned payphone lines cannot. Thus, a payphone provider with more than one line is a multi-line business. This

[30] *See* Petition at 2.

[31] *See CALLS Order*, 15 FCC Rcd at 13004, para. 106.

[32] *See CALLS Order*, 15 FCC Rcd at 12987, para. 66.

[33] *See* 47 C.F.R. §§ 69.152(d), (e) and (k).

[34] *See id.*

[35] *Wisconsin Payphone Order*, 17 FCC Rcd at 2070, para. 61.

[36] For example, if the price cap LEC's common line revenue requirement is $8.00 per line, the multi-line business SLC, with a cap of $9.20 per line, can recover the entire revenue requirement, and so there is no subsidy. Because the cap for single-line business SLCs is only $6.00 per line, however, the single-line business SLC cannot recover the entire common line revenue requirement. The shortfall in the LEC's common line revenues of $2.00 per single-line business line is therefore recovered through the multi-line business PICC, resulting in a subsidy.

[37] 47 U.S.C. § 276(a)(1). Our conclusion that payphones provide a universal service function, *see* Section III.B.2, *supra*, and so should not pay a subsidy, is distinguishable from concluding that payphones are a supported service and should receive a subsidy. This issue is being addressed by the Federal-State Joint Board on Universal Service (Joint Board) and the Commission as part of a review of the definition of services supported by federal universal service. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 15 FCC Rcd 25257 (2000). The Joint Board issued its recommendations on July 10, 2002. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 17 FCC Rcd 14095 (2002).

[38] *See* Petition at 11.

[39] 47 C.F.R. § 69.152(i).

is consistent with our treatment of other businesses with only one line at multiple locations, all of which are assessed the multi-line business SLC and PICC.

12. Petitioner contends that payphones manifest additional indicia of single-line business lines. Specifically, One Call states that each payphone is maintained as a stand-alone facility, with a separate line number that transmits an individual automatic number identification code; each payphone has a separate physical plant and dedicated line; each payphone is typically billed as a separate individual business line and has a separate billing cycle from other payphones maintained by the same provider; and payphones have no direct inward dialing or shared use.[40] While these indicia distinguish payphone lines from some multi-line business lines, many other business lines share a number of these indicia. For example, even though a chain of dry cleaners may have one telephone at each site, each with separate physical plant and dedicated line, and without shared use, each line will be charged the multi-line business SLC. In addition, the presence or absence of these indicia does not overcome the proscription of section 276(a) against the subsidization of LEC-owned payphone lines. For these reasons, we leave intact the Commission's current treatment of payphone lines as multi-line business lines for purposes of the SLC.

IV. PROCEDURAL ISSUES

A. Final Regulatory Flexibility Certification

13. The Regulatory Flexibility Act of 1980, as amended (RFA),[41] requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[42] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[43] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[44] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[45]

14. The *CALLS Order* revised the Commission's system of common line access charges by increasing the residential and single-line business line SLC, while simultaneously eliminating the PICC for these lines. The *CALLS Order* also required annual reductions in traffic sensitive switching and trunking access rates until they reached a specified level. In addition, the *CALLS Order* also established

[40] Petition at 11-12.

[41] The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[42] 5 U.S.C. § 605(b).

[43] 5 U.S.C. § 601(6).

[44] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[45] 15 U.S.C. § 632.

an interstate access universal support mechanism that provides explicit support to replace support that was implicit in interstate access charges.

15. This Order responds to a petition for reconsideration that sought, for payphone lines, the application of the common line cost recovery mechanism for residential and single-line business lines established in the *CALLS Order*, rather than the cost recovery mechanism applicable to multi-line business lines. This Order grants the petition insofar as it sought the elimination of the PICC for payphone lines, and denies the request that payphone lines be subject to the SLC applicable to single-line business and residential lines.[46] The rule revision will result in a positive net impact on small entities, in that operator service providers will no longer be assessed the PICC on payphone lines. In addition, because small and rural incumbent price cap LECs[47] will be able to increase their PICCs or common line carrier charges to offset the reduction in the number of lines being assessed the PICC revenue, their overall common line revenues will not be affected. Thus, we expect that the rule revision will have a *de minimis* impact on these affected small entities. Therefore, we certify that the requirements of the *Order* will not have a significant economic impact on a substantial number of small entities.

16. The Commission will send a copy of the *Order*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.[48] In addition, the *Order* (or summary thereof) and this final certification will be published in the Federal Register, and will be sent to the Chief Counsel for Advocacy of the U.S. Small Business Administration.[49]

B. Paperwork Reduction Analysis

17. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995, and it contains no new or modified information collections subject to Office of Management and Budget review.

V. ORDERING CLAUSES

18. Accordingly, pursuant to sections 1, 4(i) and (j), 201-209, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-209, and 276, IT IS HEREBY ORDERED that this Order and Order on Reconsideration IS ADOPTED.

19. IT IS FURTHER ORDERED that One Call's Petition for Reconsideration and Clarification IS GRANTED to the extent indicated herein and otherwise IS DENIED.

20. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

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[46] *See* Sections III.B.2 and III.C, *supra*.

[47] This Order does not affect rate-of-return carriers because they do not assess PICCs.

[48] *See* 5 U.S.C. § 801(a)(1)(A).

[49] *See* 5 U.S.C. § 605(b).

21. IT IS FURTHER ORDERED that the provisions of this Order SHALL BE EFFECTIVE on October 1, 2003.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A
LIST OF COMMENTERS

Comments/Oppositions

Coalition for Affordable Local and Long Distance Service (Coalition)
Verizon
OCI

Replies

One Call
OCI

APPENDIX B
AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

PART 69 – ACCESS CHARGES

1. The authority citation continues to read as follows:

Authority: 47 U.S.C. 154, 201, 202, 203, 205, 218, 220, 254, 403.

2. Amend § 69.153 by revising section (f) to read as follows:

Sec. 69.153 Presubscribed interexchange carrier charge (PICC)

* * * * *

(f) The PICC shall not be applicable to any payphone lines.

EXHIBIT 8

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for LECs	)	CC Docket No. 94-1
	)	
Low-Volume Long Distance Users	)	CC Docket No. 99-249
	)	
Federal-State Joint Board on Universal	)	
Service	)	CC Docket No. 96-45
	)	

ORDER ON REMAND

Adopted: July 3, 2003 **Released: July 10, 2003**

By the Commission:

I. INTRODUCTION

1. In this order, we address two issues before the Commission on remand from the United States Court of Appeals for the Fifth Circuit.[1] In the *CALLS Order*, the Commission adopted comprehensive reforms to the interstate access charge regime and universal service support for price cap carriers, based in part on a proposal submitted by the Coalition for Affordable Local and Long-Distance Service (CALLS).[2] On September 10, 2001, the Fifth Circuit affirmed the *CALLS Order* in most respects, but remanded for further analysis and explanation the decisions to size the Interstate Access Support (IAS) mechanism at $650 million and to adopt the 6.5 percent X-factor.[3] For the reasons explained below, we conclude that the

[1] *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) (*TOPUC*).

[2] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (*CALLS Order*), *aff'd in part, rev'd in part, and remanded in part, Texas Office of Public Utility Counsel*, 265 F.3d 313 (5th Cir. 2001) (*TOPUC*). CALLS consisted of the following members: AT&T, Bell Atlantic, BellSouth, GTE, SBC, and Sprint, representing both incumbent local exchange carriers (LECs) and interexchange carriers (IXCs).

[3] *TOPUC*, 265 F.3d at 317.

$650 million IAS amount included in the integrated CALLS plan represents a reasonable estimate of the implicit support in access charges to be replaced with explicit support and is supported by the record in this proceeding. We also conclude that the record supports the adoption of a 6.5 percent X-factor to achieve the Commission's target rate levels for price cap carriers.

II. BACKGROUND

A. Interstate Access Charges

2. Interstate access charges are imposed by local exchange carriers (LECs) to recover the costs of providing access to their networks for interstate and long-distance service.[4] The Commission has long recognized that, to the extent possible, interstate access costs should be recovered in the manner in which they are incurred. In particular, non-traffic-sensitive costs—costs that do not vary with the amount of traffic carried over the facilities—should be recovered through flat-rate charges, and traffic-sensitive costs should be recovered through per-minute charges.[5] This approach fosters competition and efficient pricing. The Part 69 rules governing access charges, however, have not been fully consistent with this goal. For example, the costs of the common line or loop that connects an end user to a LEC's central office should be recovered from the end user through a flat charge, because loop costs do not vary with usage.[6] Yet the subscriber line charge (SLC), a flat monthly charge assessed directly on end users to recover interstate loop costs, has been capped since its inception due to affordability concerns.[7] Historically, LECs recovered their remaining common line costs through per-minute carrier common line (CCL) charges imposed on interexchange carriers (IXCs) which, in turn, passed these charges on to their customers in the form of higher long distance rates.[8] By making the end-user rate for long distance calls more expensive, CCL charges artificially suppressed demand

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[4] The Commission uses a multi-step process to identify the cost of providing access service. First, an incumbent LEC must record all of its expenses, investments, and revenues in accordance with accounting rules set forth in our regulations. *See* 47 C.F.R. §§ 32.1-32.9000. Second, these carriers must divide these costs between those associated with regulated telecommunications services and those associated with nonregulated activities. *See* 47 C.F.R. §§ 64.901-64.904. Third, the separations rules determine the fraction of the incumbent carrier's regulated expenses and investment that should be allocated to the interstate jurisdiction. *See* 47 C.F.R. §§ 36.1-36.741. After the total amount of interstate cost is identified, the access charge rules translate these interstate costs into charges for the specific interstate access services and rate elements. *See* 47 C.F.R. §§ 69.1-69.731.

[5] *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 15992-93, para. 24 (1997) (*Access Charge Reform First Report and Order*).

[6] *Access Charge Reform First Report and Order*, 12 FCC Rcd at 16013, para. 77 ("Because common line costs do not vary with usage, these costs should be recovered on a flat-rated instead of per-minute basis. In addition, these costs should be assigned, where possible, to those customers who benefit from the services provided by the local loop.")

[7] This charge is also referred to as the end user common line (EUCL) charge. *See* 47 C.F.R. § 69.152.

[8] *See CALLS Order*, 15 FCC Rcd at 12969-70, para. 18.

for interstate long distance services.[9] CCL charges also created significant implicit subsidies flowing from high-volume to low-volume users of interstate long distance services, which have a disruptive effect on competition in the markets for local exchange and exchange access services.[10]

3. Prior to 1991, LECs' access revenues were governed by "rate-of-return" regulation. Under rate-of-return regulation, an incumbent LEC is limited to recovering its costs plus a prescribed return on investment, and is potentially obligated to provide refunds if its interstate rate of return exceeds the authorized level.[11] In 1991, the Commission implemented a price cap system for the largest incumbent LECs that altered the regulation of their interstate access charges.[12] Rather than focusing on costs, price cap regulation focuses primarily on the rates incumbent LECs may charge and the revenues they may generate from interstate access services.[13] By severing the direct link between authorized rates and realized costs, the price cap system was intended to create incentives for LECs to reduce costs and improve productivity, while maintaining affordable rates for consumers through the caps on prices.[14]

4. Although the initial price cap rates were set equal to the rates the LECs were charging under rate-of-return regulation, the rates of price cap LECs have been limited ever since by price indices that have been adjusted annually pursuant to formulas set forth in the Commission's Part 61 rules. Price cap carriers may earn returns higher or lower than the prescribed rate of return that incumbent LECs are allowed to earn under rate-of-return regulation. Price cap regulation encourages incumbent LECs to improve their efficiency by harnessing profit-making incentives to reduce costs, invest efficiently in new plant and facilities, and develop and deploy innovative service offerings, while setting price ceilings at reasonable levels. Individual companies retain an incentive to cut costs and increase productivity because, in the short run, their behavior has no effect on the prices they are permitted to charge, and they are able to keep any additional profits resulting from reduced costs.

B. Universal Service

5. One of the primary purposes of universal service support is to help provide access to

[9] *CALLS Order*, 15 FCC Rcd at 12969-70 para. 18.

[10] *Access Charge Reform First Report and Order*, 12 FCC Rcd at 15986 para. 6, 15995-96 para. 30, 16013 para. 76.

[11] *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent LEC and IXCs*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613, 19624, para. 19 (2001) (*MAG Order*).

[12] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order*).

[13] *See LEC Price Cap Order*, 5 FCC Rcd at 6787, para. 2.

[14] *Id.*

telecommunications service in areas where the cost of such service otherwise might be prohibitively expensive.[15] Historically, this purpose has been achieved both through explicit monetary payments and implicit support flows that enable carriers to serve high-cost areas at below-cost rates. Congress established principles for the preservation and advancement of universal service in the Telecommunications Act of 1996, directing the Commission to create explicit universal service support mechanisms that will be specific, predictable, and sufficient.[16] The Commission has approached this goal by, among other things, pursuing reforms intended to make universal service explicit and portable to competitive carriers.[17] Congress also articulated a national goal that consumers in all regions of the nation, including rural, insular, and high-cost areas, should have access to telecommunications services at rates that are affordable and reasonably comparable to rates charged for similar services in urban areas.[18] Section 254 provides that federal universal service support mechanisms should be specific, predictable, and sufficient to achieve the purposes of the Act.[19]

C. Prior Commission Orders

6. With the passage of the 1996 Act, the Commission determined that it was necessary to make substantial revisions to access charges and universal service in order to promote competition and preserve and advance universal service. Specifically, the Commission aligned the access charge rate structure more closely with the manner in which costs are incurred.[20] In the *Access Charge Reform First Report and Order*, the Commission created the presubscribed interexchange carrier charge (PICC), a flat per-line charge imposed by a price cap LEC on an end user's IXC. To the extent that the SLC cap prevented a price cap LEC from fully recovering its costs through the SLC,[21] the LEC could recover those costs through the PICC, up to the PICC

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[15] *See, e.g.*, *Federal-State Joint Board on Universal Service*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244, 11251, para. 13 (2001) (*RTF Order*).

[16] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). The 1996 Act amended the Communications Act of 1934 (the Act) (codified at 47 U.S.C. §§ 151 *et seq.*); *see also* 47 U.S.C. § 254(e).

[17] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8667, 8801-03, paras. 46-51 (1997) (subsequent history omitted) (adopting the principle under section 254(b)(7) of the Act that federal support mechanisms should be competitively neutral); *see also* 47 U.S.C. § 254(e). In November 2002, the Commission referred to the Federal-State Joint Board on Universal Service several issues related to the portability of universal service support. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 17 FCC Rcd 22642 (2002).

[18] 47 U.S.C. § 254(b)(3).

[19] 47 U.S.C. §§254(b)(5), (e).

[20] *Access Charge Reform First Report and Order*, 12 FCC Rcd at 15998, para. 36.

[21] As discussed above, due to affordability concerns, the SLC is subject to a cap that, particularly for residential customers, is often below the level that would enable the LEC to recover the entire interstate cost of the local loop. *See* para. 2, *supra*.

cap.[22] Any costs above the PICC cap could be recovered through the CCL charge.[23] PICCs markedly reduced the inefficient per-minute recovery of local loop costs through the CCL charge, and increased the portion of loop costs recovered through flat charges.[24]

7. Unfortunately, the advent of PICCs also created market inefficiencies.[25] Because IXCs recovered the residential PICCs on a per-account basis, residential customers with only one line paid the same as those with two or more lines, and so paid more than the costs IXCs incurred for providing them service.[26] In addition, because PICCs were not assessed directly on consumers, but instead were subjected to averaging and mark-ups by the IXCs, consumers were prevented from making head-to-head comparisons among local service providers.[27] Moreover, residential consumers paid more overall because IXCs included "transaction costs," such as Lifeline costs, universal service contributions, and bad debts associated with non-paying subscribers, in the PICCs passed through to their customers.[28]

D. The *CALLS Order*

8. On May 31, 2000, the Commission adopted the *CALLS Order*, a five-year transitional interstate access and universal service reform plan for price cap carriers, largely based on a proposal from the CALLS members.[29] In the *CALLS Order*, the Commission sought to address several controversial and interrelated issues. Incumbent LECs have traditionally argued that they must maintain their revenue streams from access charges in order to support universal service goals, while IXCs and consumers have argued that the prices charged and revenues recovered by incumbent LECs reflect the inefficient rate structure developed in a monopoly environment.[30] In order to resolve these difficult issues, the CALLS members proposed their plan for comprehensive reform of the interrelated aspects of the interstate access charge regime and universal service.[31] The Commission exercised its own independent judgment in reviewing the

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22 *Access Charge Reform First Report and Order*, 12 FCC Rcd at 16022, para. 99. Under the Commission's rules, there were separate caps for the residential and single-line business PICC and the multi-line business PICC. As discussed below, the Commission eliminated the residential and single-line business PICC in the *CALLS Order*.

23 *Id.* at 16005, para. 60.

24 *See CALLS Order*, 15 FCC Rcd at 12970, para. 19.

25 *See id.* at 12970, para. 19.

26 *Id.*

27 *Id.*

28 *Id* at 12992, para. 78.

29 *Id.* at 12964, para. 1.

30 *Id.* at 12973, 12978, paras. 26, 38.

31 *Id.* at 12974, para. 28.

CALLS plan.[32] The Commission reviewed it as a single, integrated proposal, "focus[ing its] inquiry on the reasonableness of the proposal taken as a whole."[33] The Commission found, among other things, that "its essential constituent parts individually fall within the range of reasonableness."[34] It also found that the CALLS plan served the public interest because it resolved several controversial, interrelated issues in a manner satisfactory to traditionally adverse industry groups and advanced the Commission's competitive and universal service goals.[35]

9. In the *CALLS Order*, the Commission further reformed the access charge regime for price cap carriers. Recognizing that the PICCs created market inefficiencies, the Commission sought to establish a more straightforward, economically rational common line rate structure.[36] Therefore, the Commission increased SLC caps,[37] eliminated the residential and single-line business PICC,[38] and capped multi-line business PICCs.[39] The Commission limited a price cap carrier's recovery from SLCs, the new Interstate Access Support (IAS) mechanism, multi-line business PICCs, and CCL charges to "Price Cap CMT Revenue."[40] It also addressed the historically controversial "X-factor" in the price cap formula by changing the X-factor's function from a productivity offset to a transitional mechanism for reducing per-minute access charges to target levels proposed by the CALLS members.[41] In addition, the Commission approved an immediate $2.1 billion reduction in per-minute switched access charges, which the CALLS IXC

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32 *Id.* at 12981-82, para. 49.

33 *Id.*

34 *Id.* at 12981-82, para. 49.

35 *Id.* at 12977 para. 36, 12981-82 paras. 48-49.

36 *Id.* at 12970, para. 19.

37 *See id.* at 12991-93, paras. 76-79. In the *CALLS Order*, the Commission approved graduated increases in the SLC cap for residential and single-line business lines to $5.00 per month, and approved a series of further increases conditioned on cost studies to be submitted in a future cost review proceeding. *CALLS Order*, 15 FCC Rcd at 12994, para. 83. In order to preserve affordability for low-income consumers, the Commission also increased universal service support under the Lifeline mechanism. *CALLS Order*, 15 FCC Rcd at 13057-59, paras. 218-21. Recently, the Commission approved increases in residential and single-line SLC caps to $6.50. *Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, CC Docket Nos. 96-262, 94-1, Order, 17 FCC Rcd 10868, 10869-70, para. 1 (2002) (*SLC Cap Review Order*).

38 *CALLS Order*, 15 FCC Rcd at 12991-93, paras. 76-79.

39 *Id.* at 13004-06, paras. 105-12. The multi-line business PICC is a transitional mechanism that recovers revenue that would otherwise be recoverable through charges on residential and single-line business lines. *Id.* at 13004, para. 106. In the *CALLS Order*, the Commission concluded that "maintaining this transitional mechanism continues to be a reasonable measure to avoid an adverse impact on universal service and residential customers, and is the better approach in establishing a more efficient interstate access charge rate structure consistent with our long-term universal service goals in a competitive local exchange environment." *Id.*

40 *Id.* at 12988-89, para. 70. Price Cap CMT Revenue includes common line costs, marketing expenses, and residual revenues previously recovered through the transport interconnection charge. *Id.*

41 *Id.* at 13028-39, paras. 160-84. We discuss the X-factor in greater detail in section III.B. *infra*.

members committed to pass through to their customers.[42]

10. Furthermore, the Commission established a new interstate access support mechanism, sized at $650 million annually, to replace implicit support in the interstate access charges of price cap carriers.[43] The IAS mechanism provides price cap carriers with the support required to recover a portion of their Price Cap CMT Revenues that cannot be recovered through SLCs. The Commission found $650 million to be a reasonable amount that would provide sufficient, but not excessive, support.[44] In this regard, it observed that a range of funding levels might be deemed "sufficient" for the purposes of the 1996 Act, and that "identifying an amount of implicit support in our interstate access charge system is an imprecise exercise."[45]

E. Fifth Circuit Decision

11. On September 10, 2001, the United States Court of Appeals for the Fifth Circuit upheld the *CALLS Order* in most respects, but remanded to the Commission for further consideration its decisions to size the IAS mechanism at $650 million and to set the X-factor at 6.5 percent.[46] The court held that the Commission reasonably interpreted sections 254(b)(1) and 254(i) as aspirational with respect to the maintenance of affordable rates and therefore upheld the decision to increase the residential and single-line business SLC caps.[47] The court found that, though the Commission could not reverse past policy regarding SLC caps without explanation, the Commission had articulated rational reasons for the increases.[48] The court also held that the Commission reasonably concluded that section 254(k), which requires that the Commission establish cost allocation rules, concerns allocation of joint and common costs, rather than the SLC and the PICC, which relate to the recovery of such costs.[49] The court further held that the

[42] *Id.* at 13025, paras. 151-52.

[43] *Id.* at 13046, para. 202; *see TOPUC*, 265 F.3d at 327-28. We discuss the Commission's decision to size IAS at $650 million in greater detail in section III.A., *infra*.

[44] *CALLS Order*, 15 FCC Rcd at 13046, para. 202.

[45] *Id.* at 13046, para. 201 ("The various implicit support flows (*e.g.*, business to residential, high-volume to low-volume, and geographic rate averaging) are not easily severable and quantifiable. Moreover, the competitive pricing pressures present during this transitional period between monopoly and competition present additional complexities in identifying a specific amount of implicit support.").

[46] *See TOPUC*, 265 F.3d at 329. The court also found that the Commission did not violate the Administrative Procedure Act with respect to the abbreviated notice-and-comment period for the revised CALLS proposal and *ex parte* contacts between the Commission and CALLS proponents. *Id.* at 325-27.

[47] *Id.* at 322.

[48] *Id.* The court noted several reasons for increasing the SLC cap: the effects of inflation since the last SLC cap increase minimized the real effect of the increase; studies indicating that telephone subscribership would not be negatively affected by the SLC cap increase; the increased funding of the Lifeline support program, which allayed some prior fears about affordability; the promise to conduct a cost study before the latter stages of the SLC increase; and the offset of the SLC increase by the pro-competitive benefits of the elimination of the PICC. *Id.*

[49] *Id.* at 324.

Commission could reasonably rely on market forces to restructure access rates and need not conduct a forward-looking cost study to set access rates.[50]

12. The court did find, however, that the Commission needed to provide further explanation of two aspects of the *CALLS Order*. With respect to the $650 million size of the IAS mechanism, the court concluded that, while identifying a specific amount of support is an imprecise exercise, the Commission must better explain how it arrived at the $650 million amount.[51] Similarly, the court found that the Commission must demonstrate a rational basis for its derivation of the 6.5 percent X-factor.[52] In response to the remand, the Common Carrier Bureau issued a public notice seeking further comment regarding the $650 million IAS amount.[53]

III. DISCUSSION

A. $650 Million Interstate Access Support Amount

13. We conclude that $650 million is a reasonable estimate of the implicit support in the interstate access rate structure that must be replaced by IAS in order to accomplish the Commission's competitive and universal service goals in adopting the transitional CALLS plan. The CALLS members proposed a $650 million support amount as part of their integrated proposal for resolving several interrelated and difficult issues associated with access charge reform. The Commission stated that it would adopt individual elements of the proposal, including the $650 million support amount, if the elements were, in the Commission's independent judgment, within a range of reasonableness.[54] Careful consideration of all of the studies submitted in this proceeding allows us to define a relatively narrow range of reasonable support amounts. The $650 million IAS amount proposed by the CALLS members falls within this range of reasonable support amounts. Moreover, as we discuss below, we conclude that nothing in the record, including recent studies by NASUCA and Qwest, indicates that there is a more reasonable support amount than the one proposed in the CALLS plan. We find that a $650 million support amount adequately balances our various policy goals, including the availability of service in all areas at rates that are affordable and reasonably comparable to nationwide rates, the promotion of competition and efficient investment in rural America, and the facilitation of the transitional reforms of the access rate structure adopted in the *CALLS Order*.

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[50] *Id.* at 324-25.

[51] *Id.* at 328; *see also* para. 17, *infra*.

[52] *TOPUC*, 265 F.3d at 328-29; *see also* para. 38, *infra*.

[53] *Common Carrier Bureau Seeks Comment on Remand of $650 Million Support Amount Under Interstate Access Support Mechanism for Price Cap Carriers*, CC Docket Nos. 96-262, 94-1, 99-249, and 96-45, Public Notice, 16 FCC Rcd 21307 (Com. Car. Bur. 2001) (*CALLS Remand Public Notice*). The Bureau did not seek further comment on the remand of the 6.5 percent X-factor, indicating that it would rely on the existing record with respect to that issue. *Id.* at 21308 n. 5. Pursuant to an agency reorganization, the Common Carrier Bureau subsequently became the Wireline Competition Bureau.

[54] *CALLS Order*, 15 FCC Rcd at 12981-82, para. 49.

1. Background

14. As discussed above, in the *CALLS Order*, the Commission adopted several reforms designed to rationalize, and remove implicit support from, price cap carriers' interstate access rates.[55] In order to make these reforms possible, the Commission adopted a new explicit universal service mechanism—IAS—to replace implicit support previously collected through interstate access charges.[56] The IAS mechanism distributes support to carriers serving lines in areas where they are unable to recover their permitted CMT revenues from SLCs despite the revised caps.[57] The IAS mechanism accomplishes this by using several mathematical calculations to determine per-line support amounts for each Unbundled Network Element (UNE) zone based on the extent to which the average allowable CMT revenue per line for the zone exceeds certain benchmarks.[58] Specifically, in any geographically deaveraged UNE zone where the average common line revenue per line for that zone would exceed a benchmark of $7.00 per line for residential and single-line business lines and a benchmark of $9.20 per line for multi-line business lines, the IAS mechanism would provide support for a portion of the difference between CMT revenue allowed and the benchmarks.[59] Although the aggregate difference between permitted common line revenue per line and the benchmarks exceeds $650 million, the IAS mechanism employs a series of formulas to apportion support so that it does not exceed $650 million per year.[60] The amount of IAS provided in each study area is also adjusted on a phased-in basis so that by July 1, 2003, CCL charges and multi-line business PICCs will be eliminated for most lines served by price cap LECs.[61] To the extent that carriers cannot recover their allowable

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[55] Carriers recover costs assigned to the interstate jurisdiction pursuant to either the Commission's price cap regulations or its rate-of-return regulations. The Commission addressed reform of the access rate structure for rate-of-return carriers in the *MAG Order*. *MAG Order*, 16 FCC Rcd at 19616, para. 2. The Commission's universal service rules also distinguish between rural carriers, which are typically small carriers that meet the definition of "rural telephone company" in the Act, and non-rural carriers for the purpose distributing support for costs assigned to the intrastate jurisdiction. *See* 47 U.S.C. § 153(37). Although most rural carriers are subject to rate-of-return regulation, there are approximately 105 rural price cap carriers. *See* NASUCA Reply at 11.

[56] *CALLS Order*, 15 FCC Rcd at 13039, para. 185.

[57] *Id.* at 13043, para. 195; *see also supra* note 40 and accompanying text.

[58] *CALLS Order*, 15 FCC Rcd at 13043-44, para. 196. A UNE zone is a state-created zone pursuant to section 51.507(f) of the Commission's rules, which requires states to establish different rates for unbundled network elements in at least three defined geographic areas within the state to reflect geographic costs differences. 47 C.F.R. § 51.507(f).

[59] *CALLS Order*, 15 FCC Rcd at 13043 para. 196. For purposes of calculating IAS, the SLC cap on non-primary residential lines and single-line business lines is set at $7.00, and the SLC cap on multi-line business lines is set at $9.20. Although the maximum residential SLC cap changed from $7.00 in the Original CALLS Proposal to $6.50 in the Modified Proposal, the CALLS members continued to use $7.00 for purposes of allocating IAS to each price cap LEC's service area to maintain consistency of benchmarks between primary and non-primary residential lines. *Id.* at 13043 n. 427.

[60] *Id.* at 13043-44, para. 196.

[61] *Id.*

CMT revenues through SLCs and IAS, they recover their CMT revenues through a multi-line business PICC—up to a monthly cap of $4.31—and then CCL charges.[62]

15. In adopting this mechanism, the Commission found the proposed $650 million IAS support amount to be a reasonable estimate of the amount of implicit support to be replaced in the price cap access rate structure with explicit, portable support.[63] In light of the inherently imprecise nature of identifying implicit support in the access rate structure, the Commission found the $650 million support amount reasonable for several reasons. The divergent interests of the CALLS members—IXCs and low-cost LECs that are net contributors to the universal service fund and high-cost LECs that are net recipients of universal service—provided significant incentive for the CALLS members to ensure that the estimate was reasonable.[64] The Commission further noted that the CALLS group submitted an AT&T-developed forward-looking cost study that estimated a support amount of $613 million.[65] This estimate relied on the Commission's model for calculating high cost loop support for non-rural carriers and assumed increases to the SLC cap consistent with those the Commission adopted.[66]

16. The Commission found further evidence of the reasonableness of the $650 million support amount in the fact that this amount was within the widely ranging estimates of implicit support in various studies before the Commission. For example, the United States Telecom Association estimated, based on embedded costs, that interstate common line rates then contained $3.9 billion in implicit universal service support.[67] Commission economists William Rogerson and Evan Kwerel compared embedded costs to forward-looking costs to estimate that interstate access rates included $1.9 billion in implicit support.[68] The CALLS members noted, but did not advocate reliance on, a study that used the HAI forward-looking model to estimate a

[62] *See* 47 C.F.R. §§ 61.46(d), 69.153.

[63] *CALLS Order*, 15 FCC Rcd at 13046-47, para. 202.

[64] *Id.* at 13046-47, para. 202.

[65] *Id.* at 13045, para. 200. The other members of the CALLS group did not join in the citation of this study. *See Memorandum in Support of the Revised Plan of the Coalition for Affordable Local and Long Distance Service*, CC Dockets 94-1, 96-45, 99-249, 96-262, filed by CALLS on March 8, 2000.

[66] *CALLS Order*, 15 FCC Rcd at 13045, para. 200. In the *Universal Service Fifth Report and Order*, the Commission approved the Synthesis model for use in calculating high-cost support for non-rural carriers. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fifth Report and Order, 13 FCC Rcd 21323 (1998) (*Universal Service Fifth Report and Order*). The Synthesis model is a series of algorithms that allow the user to estimate the cost of building a telephone network. *CALLS Order*, 15 FCC Rcd at 13045 n. 438; *see also generally Universal Service Fifth Report and Order*.

[67] *CALLS Order*, 15 FCC Rcd at 13045, para. 199 (citing USTA Comments, CC Dockets 96-45 and 96-262 filed July 23, 1999).

[68] *Id.* at 13045, para. 199 (citing *A Proposal for Universal Service and Access Reform*, Rogerson and Kwerel, CC Docket Nos. 96-45 and 96-262 (filed May 27, 1999) (Rogerson and Kwerel study).

$250 million support amount.[69] US West used the Commission's Synthesis model to estimate a support amount of $1.2 billion, but did not assume increases to the SLC cap consistent with those the Commission adopted.[70] ALTS and Time Warner proposed an alternative plan that would provide $300 million in explicit universal service support, but provided no empirical evidence in support of this amount.[71] Also before the Commission, but not cited with respect to the Commission's decision to size the IAS mechanism at $650 million, was a study filed by the Common Carrier Bureau's Industry Analysis Division (IAD).[72]

17. The Fifth Circuit remanded the *CALLS Order* to the Commission for further analysis and explanation of the $650 million support amount.[73] The court recognized that "identifying a specific amount is an 'imprecise exercise' and that [its] review of the [support amount] is especially deferential due to its transitional nature."[74] The court concluded, however, that the Commission "failed to exercise sufficiently independent judgment in establishing the $650 million amount," by granting "near-total deference" to the fact that many parties agreed that $650 million was an adequate support amount.[75] The court stated that "the [Commission] must provide some explanation as to why it found one study more persuasive than the other, even if it does not determine a precise amount as the 'only' correct figure."[76] In particular, the court noted that the Commission "hint[ed] at a reasoned analysis" with respect to the AT&T study based on the Synthesis model and the ALTS/Time Warner estimate, but failed to address other studies.[77] On remand, the court therefore directed the Commission to provide further analysis and explanation justifying $650 million as an appropriate amount of support available under the IAS

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69 *Id.* at 13045, para. 199 (citing CALLS Supplemental Reply at 11 n. 20 (filed April 17, 2000)). The CALLS members noted this study as an example of the wide-ranging estimates of the appropriate size of the mechanism. CALLS Supplemental Reply at 11. AT&T developed the study based on the HAI model, but has advocated that the Commission rely on its other study, which used the Synthesis model. Like the Synthesis model, the HAI model uses a series of algorithms to estimate the cost of building a telephone network. *CALLS Order*, 15 FCC Rcd at 13045 n. 436. The Commission incorporated some elements of the HAI model in developing the Synthesis model, but has not approved the HAI model for use in calculating universal service support. *See generally Universal Service Fifth Report and Order.*

70 *CALLS Order*, 15 FCC Rcd at 13048, para. 204 (citing US West Supp. Comments at 7).

71 *Id.* at 13048, para. 204 (citing ALTS and Time Warner Supp. Comments at 17).

72 CALLS Analysis, CC Docket Nos. 96-262, 94-1, 99-249, and 96-45, (filed by Industry Analysis Division, Common Carrier Bureau on May 25, 2000) (IAD CALLS Study). IAD is now known as the Industry Analysis and Technology Division. The work underlying this study is posted to the Commission website at www.fcc.gov/wcb/iatd/lec.html. The Commission relied on this study in other aspects and attached portions of the study as Appendix C of the *CALLS Order*. *See CALLS Order*, 15 FCC Rcd at 12978-79 para. 41, 13140-43.

73 *TOPUC*, 265 F.3d at 327-28.

74 *Id.* at 328.

75 *Id.*

76 *Id.*

77 *Id.*

mechanism.[78]

18. In response to the remand, the Common Carrier Bureau (Bureau) issued a public notice seeking further comment on the $650 million support amount.[79] Specifically, the Bureau sought comment on the uses of a cost model, including the Commission's Synthesis model and the AT&T study, to identify the appropriate size of the IAS mechanism.[80] The Bureau also sought comment on the use of other studies to determine whether $650 million is the support amount that best serves the Commission's universal service goals.[81] In addition to the comments and reply comments addressing the studies previously filed in the proceeding, NASUCA filed reply comments outlining its own study, which relied on the Commission's Synthesis model, albeit with significant alterations.[82] Based on this study, NASUCA claims that the IAS mechanism should be sized at $336 million if the residential and single-line business SLC cap is $6.50.[83] Qwest, successor to US West, revised US West's earlier estimate of $1.2 billion to $978 million to reflect the higher SLC caps adopted by the Commission.[84]

2. Discussion

19. We conclude that the record in this proceeding supports the Commission's decision to size the IAS mechanism at $650 million. Below, we address each of the cost studies filed in this

[78] *Id.*

[79] *CALLS Remand Public Notice*, 16 FCC Rcd at 21307. The Bureau did not seek further comment regarding the 6.5 percent X-factor. *Id.* at 21308 n. 5. The Bureau is now known as the Wireline Competition Bureau.

[80] *Id.* at 21308.

[81] *Id.* at 21308.

[82] NASUCA Reply. The NASUCA study was originally developed for the SLC cap review proceeding. *See* NASUCA Reply in CC Docket Nos. 96-262, 94-1, and 96-45 (filed January 24, 2002). In the *CALLS Order*, the Commission stated that it would conduct a cost review proceeding prior to the scheduled increase to the residential and single-line business SLC cap above $5.00. *CALLS Order*, 15 FCC Rcd at 12994, para. 83. As stated above, the Commission recently approved graduated SLC cap increases to $6.50. *SLC Cap Review Order*, 17 FCC Rcd at 10869-70, para. 1.

[83] On January 14, 2002, eight days before comments were due in response to the *CALLS Remand Public Notice*, NASUCA filed a petition requesting modification of the Interim Protective Order in the non-rural high-cost proceeding in order to permit it to use wire center line data necessary to its detailed study. *Request of National Association of State Utility Consumer Advocates for a Second Limited Modification of Interim Protective Order (IPO)*, CC Docket Nos. 96-262, 94-1, and 96-45 (filed January 14, 2002). On February 6, 2002, two days after reply comments were due, NASUCA filed "reply comments" in which it outlined the conclusions of its study along with some of its major features. On May 6, 2002, the Commission released a modification to the Interim Protective Order to permit NASUCA to file its complete cost study. *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, and 96-45, Order, 17 FCC Rcd 8252 (2002). On May 29, 2002, NASUCA made two *ex parte* filings which included its detailed cost study. Letters from Michael J. Travieso, Maryland People's Counsel, to Marlene H. Dortch, FCC, filed May 29, 2002 (NASUCA *ex parte* letters).

[84] Qwest Comments at 7-10.

proceeding. We conclude that they establish a range of reasonable support amounts, based on forward-looking and embedded cost estimates, from $593 million to $978 million. Because the $650 million IAS amount proposed in the CALLS members' comprehensive plan for access reform falls within this range of reasonable estimates, we then address whether the $650 million IAS amount appropriately balances the Commission's relevant goals. We conclude that the $650 million support amount is a reasonable estimate of the amount of implicit support in access charges to be replaced by explicit, portable support. This support amount appropriately balances the Commission's relevant policy goals. We therefore do not change the support amount adopted in the *CALLS Order*.

a. Cost Studies in the Record

20. In this section, we address each of the cost studies in the proceeding, as requested by the Fifth Circuit. We first discuss the relevance, as a general matter, of forward-looking cost studies to our analysis. We then address each of the seven cost studies discussed by the Commission in the *CALLS Order*. Finally, we address the more recent study filed by NASUCA in response to the *CALLS Remand Public Notice*.

21. As an initial matter, we agree with commenters that it is appropriate to consider forward-looking cost estimates in determining the reasonableness of the $650 million support amount.[85] We disagree, however, with commenters who contend that IAS should be sized solely on the basis of a forward-looking cost estimate.[86] In the *Universal Service First Report and Order*, the Commission established that, ideally, federal universal service support would be based on the forward-looking economic cost of constructing and operating the network used to provide supported services, rather than on a carrier's embedded costs.[87] Forward-looking support mechanisms promote efficiency and send the correct signals for entry, innovation, and investment.[88] In the context of determining the appropriate size of the IAS mechanism, forward-

[85] AT&T Comments at 2-3; NASUCA Reply at 3-4. The studies in this proceeding use two kinds of methodologies to estimate the amount of implicit support that should be replaced with explicit support. Forward-looking cost studies—such as those submitted by AT&T, US West, and NASUCA—estimate the amount of costs incurred in constructing and maintaining a theoretical efficient network that cannot be recovered through a carrier's end-user charges, such as SLCs. On the other hand, embedded cost studies—such as those provided by USTA and IAD—estimate the difference between price cap carriers' allowable CMT revenues and their revenues from SLCs. The difference, or "gap," indicates the amount of allowable CMT revenues that may only be recovered through explicit support or inefficient rate elements that contain implicit support, such as the PICC or the CCL charge.

[86] NASUCA Reply at 4-6; Focal Communications Supplemental Comments at 16 (filed April 3, 2000); Level 3 Supplemental Comments at 5-6 (filed April 3, 2000). We do not address NASUCA's contention that we should not provide support to price cap carriers that exceeds the forward-looking cost of service. NASUCA Reply at 3. This contention relates to the IAS distribution formula, which is not at issue on remand, rather than the size of the IAS mechanism.

[87] *Universal Service First Report and Order*, 12 FCC Rcd at 8899-901, paras. 224-29. We note that in the *MAG Order*, 16 FCC Rcd at 19668, para. 129, the Commission concluded that the appropriate level of interstate support for rate-of-return carriers should be determined based on embedded costs.

[88] *Id.* at 8899 para. 224.

looking studies may provide useful insight into the costs associated with providing services with an efficient network and, in turn, an appropriate amount of support for an efficient network. We conclude, however, that it would not be appropriate to rely solely on estimates derived from forward-looking analysis in determining the amount of support to provide under the *CALLS Order*. The access reform measures adopted in the *CALLS Order* continue to rely on embedded costs rather than forward-looking costs. Specifically, the IAS mechanism adopted by the Commission distributes support based on embedded costs because the Commission concluded that this would best facilitate the transitional reform of the access rate structure.[89] Also, the Commission concluded that forward-looking costs should not be used to set rates for price cap carriers, and the access rate structure that was reformed in the *CALLS Order* continues to rely on embedded costs to set rates for SLCs, multi-line business PICCs, and CCL charges, a decision upheld by the Fifth Circuit Court of Appeals.[90] We further note that the Commission has, at this time, authorized use of the forward-looking Synthesis model only for the distribution of non-rural high-cost support, and not for other universal service mechanisms. Moreover, the Synthesis model does not include data for the approximately 105 rural study areas served by price cap carriers subject to the *CALLS Order*.[91] For these reasons, we find that the Commission's Synthesis model produces useful evidence for estimating the appropriate size of the IAS mechanism, but that it would be inappropriate to rely solely on forward-looking cost estimates to determine an IAS amount.

22. Several estimates of the appropriate size of the IAS mechanism were considered by the Commission in the *CALLS Order*. Of these, AT&T's estimate of $613 million was the most reasonable forward-looking study available. The study utilizes the Synthesis model, which has been studied by many parties and approved by the Commission for calculating intrastate high-cost support for non-rural carriers. The study's methodology—comparison of the interstate portion of the costs generated by the model to the then-proposed SLC caps of $7.00 for residential and single-line business lines and $9.20 for multi-line business lines—is generally reasonable. Nevertheless, there are some problems with AT&T's study. Some parties have questioned AT&T's method of aggregating the lines in the model into three zones per study area.[92] AT&T offers no justification for this aggregation method.[93] AT&T has not provided sufficient supporting documentation for the Commission staff to quantify the effect of using

[89] *CALLS Order*, 15 FCC Rcd at 13049-55, paras. 206-13.

[90] *See id.* at 12990-3007, paras.75-112; *TOPUC*, 265 F.3d at 324-25.

[91] *See* NASUCA Reply at 11. In comparison, there are 80 non-rural price cap studies in the model. *See id.*

[92] Qwest Comments at 6; NASUCA Reply at 10.

[93] *See* NASUCA Reply at 10. Elsewhere, AT&T states that a different aggregation method based on UNE zones creates the most appropriate balance of incentives for price cap carriers. AT&T Reply at 2-4 ("[The *CALLS Order*] created a unified and harmonized structure between SLC deaveraging, UNE bundling and interstate access support centering on the UNE zone (which reflects aggregated wire center data). That structure creates balanced incentives for all parties to seek reasonable disaggregation. Disassociating USF from the UNE zone would unbalance those incentives.").

AT&T's aggregation method, rather than another method.[94] Notwithstanding these deficiencies, the AT&T study methodology generally appears reasonable. We conclude that the AT&T study provided the most reasonable estimate based on forward-looking costs available at the time of the *CALLS Order*.

23. Staff in the Bureau's Industry Analysis Division also performed a credible analysis based on publicly available embedded cost data that permits an IAS estimate of $978 million.[95] The IAD CALLS Study compares forecasted rates and revenues under the existing rules at the time of the CALLS plan to what would likely occur for each year of the CALLS plan.[96] The study reasonably forecasts growth for each price cap study area and estimates the amount of revenue that will be recovered by each price cap carrier from each of the various revenue streams, including SLCs, universal service support, multi-line business PICCs, and CCL charges.[97] These estimates accurately account for each of the access reforms adopted by the Commission, including the phased-in increases to the residential and single-line business SLC caps, the elimination of the residential and single-line business PICCs, and the cap on the multi-line business PICC.[98] The study concludes that, in the final year of the transitional reforms adopted in the *CALLS Order*, the gap between the capped SLC revenues and allowable CMT revenues will be approximately $978 million.[99] We note that this finding is consistent with comments filed by Verizon and SBC, who argue that the $650 million support amount is appropriate because it permits price cap carriers to recover most, but not all, of the gap between their SLC revenues and their allowable CMT revenues through IAS.[100] As discussed below, we

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[94] Qwest contends that AT&T's method of aggregation results in a downward bias in the estimated support amount. *See* Qwest Comments at 6 ("AT&T inappropriately combines high-cost, low-density areas with urban and suburban areas in a way that dramatically underestimates the amount of universal service support needed in very high-cost, low-density areas"). *But see also* NASUCA Reply at 3 (contending that AT&T uses inappropriate aggregation method and that results of AT&T study are too high).

[95] CALLS Analysis, CC Docket Nos. 96-262, 94-1, 99-249, and 96-45, (filed by Industry Analysis Division, Common Carrier Bureau on May 25, 2000) (IAD CALLS Study). IAD is now known as the Industry Analysis and Technology Division. The work underlying this study is posted to the Commission website at www.fcc.gov/wcb/iatd/lec.html.

[96] IAD CALLS Study.

[97] *Id.*

[98] *Id.*

[99] IAD estimated that in the final year of the CALLS plan, price cap carriers would recover $650 million in CMT revenues from the IAS mechanism, $238 million from multi-line business PICCs, and $90 million from CCL charges. IAD CALLS Study, Appendix D at 4 (estimating IAS and multi-line business PICC revenue), Appendix E at 11 (estimate of CCL charge revenues equals difference between originating and terminating per-minute access rates multiplied by forecasted minutes of use). Thus, the IAD CALLS Study suggests an explicit universal service mechanism totaling $978 million would be necessary to eliminate completely all of the implicit support remaining in the access rate structure after the access charge reforms that the Commission adopted are taken into account.

[100] Verizon Comments at 3-6 (arguing that $650 million represents approximately 70 percent of the price cap carriers' allowable CMT revenues); SBC Comments at 3-4 ("The purpose of the $650 million is to provide support for a portion of the difference between an incumbent LEC's actual common line revenue requirement and the (continued....)

agree that it is appropriate to size the IAS mechanism to permit carriers to recover most, but not all, of this gap in order to balance the Commission's access reform and universal service policy goals in this proceeding.[101]

24. The remaining cost studies considered by the Commission at the time of the *CALLS Order* provide little or no aid in identifying a reasonable range of support amounts. We do not find Qwest's $978 million forward-looking estimate persuasive.[102] Qwest used the Synthesis model in its "density zone" mode, which clusters lines within a study area to non-contiguous zones based on the density of their line populations.[103] This tends to aggregate very high-cost lines with only other very high-cost lines, thereby substantially reducing the effects of rate averaging and increasing the estimated support amount.[104] For example, aggregating lines at the wire center—still a very fine level of granularity, but larger than density zones—decreases the amount of support required under Qwest's study to $765 million.[105] We find that, contrary to Qwest's arguments, this failure to provide any rate averaging benefit creates a significant upward bias in the amount of support required.

25. We also find that it would be inappropriate to rely on USTA's $3.9 billion embedded cost estimate in determining a range of reasonable support amounts. USTA's estimate, which was examined by the Commission at the time but was not provided by USTA specifically for the CALLS proceeding, provides insufficient documentation for the Commission to determine whether there are any flaws in the methodology.[106] The estimate appears to include universal service support for purposes that are not at issue in this proceeding, such as intrastate support for

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incumbent LEC's permitted common line end user recovery. . . .").

[101] *See* section III.A.2.b., *infra*.

[102] When the *CALLS Order* was adopted, US West—Qwest's predecessor—used the same general methodology to estimate a $1.2 billion support amount. *See CALLS Order*, 15 FCC Rcd at 13048, para. 204. That study assumed a $6.50 SLC cap on multi-line business lines, when a $9.20 SLC cap was, in fact, adopted by the Commission. *Id.* The Qwest study filed in this proceeding corrects this assumption. Qwest Comments at 8. We note that the $978 million estimated by Qwest's forward-looking study is the same as the amount estimated by IAD's embedded cost analysis. These results are merely coincidental, however, and are not relevant to our conclusions that the methodology underlying IAD's study is persuasive while the methodology underlying Qwest's study is not persuasive.

[103] Qwest Comments at 7-8. The Synthesis model is able to calculate costs for an entire study area or, at a more disaggregated level, on either a wire center or density zone basis. In all cases, the model first identifies clusters of customer locations. In each cluster, density is computed by dividing surface area (in square miles) by the number of lines. The model aggregates clusters into either wire centers or density zones, depending on the "output mode" chosen by the programmer. In wire center aggregation mode, the model assigns all clusters within a particular wire center to that wire center. In density zone aggregation mode, the model assigns each cluster to one of nine density zones (*e.g.*, 0-5 lines per square mile, 5-100 lines per square mile, etc.), which are not necessarily contiguous.

[104] AT&T Reply at 2-3; NASUCA Reply at 10-11.

[105] Qwest Comments at 9 n. 32.

[106] USTA Comments, CC Docket Nos. 96-45 and 96-262 (filed July 23, 1999).

non-rural carriers and implicit support in the access rate structure for rate-of-return carriers.[107] Thus, we cannot conclude that the USTA study represents a reliable estimate for our purposes in this proceeding.

26. As part of a separate proposal to reform the interstate access rate structure and universal service filed prior to the first CALLS proposal, Commission economists Rogerson and Kwerel submitted a study indicating that the support amount with a $6.50 SLC cap should be $1.9 billion.[108] The Rogerson and Kwerel methodology is primarily concerned with promoting efficient competition in all regions, including those with significant geographic rate-averaging. It seeks to accomplish this goal by making available a large amount of support to completely eliminate alleged competitive advantages for competitive carriers that serve only low-cost areas within a study area.[109] We therefore find the Rogerson and Kwerel study inappropriate for the purposes of identifying the appropriate size of the IAS mechanism because it is not specifically designed to estimate the amount of implicit support in interstate access charges to be replaced by explicit support in order to accomplish the *CALLS Order*'s reforms.

27. Finally, the ALTS/Time Warner study and the HAI model study cited by the CALLS members are unsupported. As the Commission noted in the *CALLS Order*, ALTS and Time Warner "merely assert, without any empirical support, that the interstate access universal service support mechanism would be more appropriately sized at $300 million."[110] In addition, the interstate support mechanism proposed by ALTS and Time Warner was based on an alternate plan which would have substantially reduced the need for interstate access support and was ultimately rejected by the Commission.[111] The CALLS members cited the $250 million estimate based on the forward-looking HAI model to demonstrate the widely ranging estimates of appropriate support amounts, but no party, including the CALLS members, advocated its use in this proceeding or provided a detailed description of the study.[112] Moreover, the Commission previously had rejected the use of the HAI model as the appropriate tool for estimating forward-looking costs for purposes of calculating non-rural high-cost support and our reasons for doing so apply here as well.[113] Therefore, we do not believe that it would be appropriate to use the HAI

[107] *Id.*

[108] Rogerson and Kwerel study.

[109] *Id.* at 4. The Rogerson and Kwerel study computes forward-looking loop costs for each wire center in a company study area. *Id.* at 9. It then computes an average loop cost in three different density zones by inflating these forward-looking costs proportionally to obtain deaveraged loop costs, so that each ILEC will recover permitted revenue if it charges prices equal to the deaveraged loop costs. *Id.* at 9, 12 n.3. Finally, the study computes a support amount by comparing average cost per zone to a company's SLC revenues in that zone. *Id.* at 12 nn. 4-5, 15, 31.

[110] *CALLS Order*, 15 FCC Rcd at 13048, para. 204.

[111] *See* ALTS/Time Warner Supplemental Comments at 14 (filed April 3, 2000); AT&T Comments at 6.

[112] CALLS Supplemental Reply at 11 n. 20 (filed April 17, 2000). AT&T developed the study, but never advocated its use in this proceeding.

[113] *Universal Service Fifth Report and Order*, 13 FCC Rcd at 21323, para. 3; The Commission included elements (continued....)

model to size IAS.

28. In addition to the studies before the Commission at the time it adopted the *CALLS Order*, one party filed a new study in response to the *CALLS Remand Public Notice*. NASUCA filed a forward-looking study estimating that IAS should be sized at $336 million if the SLC cap on residential and single-line business lines were $6.50.[114] Although a useful starting point, we find that the NASUCA study would require significant adjustment to yield a reliable forward-looking cost estimate.[115] The NASUCA study includes changes to the Synthesis model that the Commission declined to adopt in the *SLC Review* proceeding.[116] Specifically, NASUCA modifies the model results to permit structure sharing between the feeder and distribution networks, to remove loop costs that it considers to be traffic-sensitive in nature, and to attribute different portions of the port to the interstate jurisdiction and different portions of the corporate overhead to the loop.[117] In the *SLC Review* proceeding, the Commission declined to rely on NASUCA's studies that incorporated these changes because their results were unverifiable by the Commission staff and because the changed assumptions in those studies generated disagreement among parties.[118] Moreover, these loop and port costs are currently included in price cap carriers' allowed CMT revenues and therefore recoverable through the IAS mechanism. We do

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of the HAI model (as well as other proposed models) in its Synthesis model, but found that the HAI model did not permit the Commission "to adopt a framework or platform that would estimate the cost of building a telephone network to the subscriber's actual geographic location, taking into account the actual clustering of customers groupings such as neighborhoods and towns." *Id.* Additionally, the HAI model did not sufficiently permit the Commission to vary engineering assumptions. *Id.* The HAI results are not readily accessible to the public, while the Synthesis model's results are posted to the Commission's website.

[114] NASUCA Reply at 11-12; NASUCA *ex parte* letters. As stated above, the Commission approved incremental increases to the SLC cap on June 4, 2002. 17 FCC Rcd 10868, 10869-70, para. 1 (2002) (*SLC Cap Review Order*, 17 FCC Rcd at 10869-70 para. 1. The SLC cap will be $6.50 beginning July 1, 2003. *Id.*

[115] Among its merits, the NASUCA study aggregates lines by UNE zone, which is consistent with the Commission's decisions to permit price cap carriers to disaggregate universal service support and deaverage SLCs by UNE zone. NASUCA Reply at 9-11.

[116] *SLC Review Order*, 17 FCC Rcd at 10884-85 para. 37. In the *SLC Review* proceeding, NASUCA presented the results of six different model runs, with each run highlighting an assumption over which parties debated. *Id.* at 10883 para. 34. The first, or default, run used all assumptions relied on by the Commission in determining forward-looking costs for universal service purposes, with the exception of the method for allocating common costs (which is unnecessary for purposes of calculating non-rural high-cost support, but is necessary for determining loop costs). The other runs were based on the default run, but changed certain parameters of the model. *Id.* at 10883 para. 34.

[117] NASUCA Reply at 6-11. We note that there is a limited record in this proceeding with respect to NASUCA's proposed changes to the model. This circumstance may be attributable to NASUCA's filing of its study in its reply comments. In an ex parte filing with the Commission, however, Sprint contests the appropriateness of NASUCA's changes to the model. Letter from Pete Sywenki, Sprint, to Marlene H. Dortch, Federal Communications Commission, filed September 13, 2002 (*Sprint Ex Parte Letter*). Sprint argues that, contrary to NASUCA's assertions, the feeder and transmission portion of the digital loop carrier are not traffic sensitive components of the loop and that the formula on which NASUCA relies to determine the amount of feeder and distribution network that share common structure has flaws that result in overstatement of shared structure. *Id.*

[118] *SLC Cap Review Order*, 17 FCC Rcd at 10884-85, para. 37.

not consider this remand proceeding an appropriate venue for reexamining the underlying decision to allocate costs in this manner. For the same reasons, we agree with Sprint that it is inappropriate to rely on NASUCA's study as submitted.[119] NASUCA's study is further flawed because it does not include forward-looking costs associated with serving multi-line business lines, which are also supported in certain high-cost areas. We also note that NASUCA estimates the amount of support for rural price cap study areas that are not in the Synthesis model based on actual IAS received, rather than forward-looking model results.[120] NASUCA's inability to use the Synthesis model to estimate forward-looking costs for these study areas demonstrates the inappropriateness of relying solely on forward-looking costs to size IAS.[121] For these reasons, we do not find NASUCA's $336 million estimate to be a reasonable IAS amount.

29. Nevertheless, we find that NASUCA's study, with appropriate adjustments, permits us to reasonably estimate forward-looking costs.[122] Undoing NASUCA's modifications to the Synthesis model related to structure sharing and costs that NASUCA argues are traffic-sensitive increases the support amount estimated by NASUCA's study from $336 million to $516 million. Including multi-line business lines in the study increases the support amount estimated by the model by another $80 million to $593 million. We note that this support estimate may still be conservative, because we believe that there may be merit to Sprint's argument that NASUCA's methodology underestimates support required for rural price cap study areas not reflected in the Synthesis model.[123] Without NASUCA's alterations to the Commission's Synthesis model, and with the costs of multi-line business lines included, the NASUCA study yields a forward-looking cost estimate of $593 million.

b. Appropriateness of $650 million IAS amount

30. The studies before us, therefore, establish a range of reasonable estimates of implicit support to be replaced by IAS between $593 million, as established by the restated NASUCA

[119] *Sprint Ex Parte Letter.*

[120] NASUCA Reply at 11-12; NASUCA *ex parte* letters. NASUCA also uses actual support amounts for four Qwest study areas that have UNE zones below the wire center level. *Id.* Sprint argues that NASUCA's methodology underestimates the amount of support for rural price cap study areas, because it assumes that the impact of reducing support for non-rural companies would be directly proportional to the impact on rural companies. *Sprint Ex Parte Letter.* Because rural price cap carriers tend serve higher cost lines than non-rural price cap carriers, Sprint contends that the support amount estimated for rural price cap carriers should be higher than estimated by NASUCA's study. *Id.*

[121] *See* para. 21, *supra.*

[122] See Appendix A (describing Commission staff's methodology for restating NASUCA study).

[123] *Sprint Ex Parte Letter.* We did not quantify the impact of Sprint's concern regarding NASUCA's methodology for estimating support for rural price cap carriers because the record before us does not include any alternative methodology for performing this estimate. The Commission's restatement of the NASUCA study does adjust the amount of attributed to rural price cap study areas to reflect its other adjustments to the non-rural price cap portion of the NASUCA study, but does so proportionally to non-rural study areas as done in NASUCA's methodology. *See* Appendix A.

study, and $978 million, as established by the IAD CALLS Study. As we have noted, identifying the amount of implicit support to be replaced by explicit universal service support is an imprecise task.[124] The court recognized, however, that the Commission does not need to determine "a precise amount as the only 'correct' figure."[125] Rather, we must explain why, in our independent judgment, the $650 million support amount is appropriate. Having determined that the $650 million IAS amount proposed by the CALLS members is within the range of reasonable support amounts, we address whether there is any basis for concluding that a different support amount within the range would better balance the Commission's goals. We conclude that the IAS amount proposed by the CALLS members as part of its integrated plan for reforming access charges reasonably and appropriately balances all of the Commission's relevant policy goals.

31. We conclude that the $650 million amount more appropriately balances the Commission's goals than would a higher support amount. By conservatively setting the support amount at $650 million, we ensure that a substantial portion of the gap between SLC revenues and allowable CMT revenues will be covered by support, while minimizing the risk that the support amount will be too large. The Commission will, at the end of the transitional period of reform adopted in the *CALLS Order*, consider permanent resolution of any remaining issues related to the price cap access rate structure. The amount of support in the IAS mechanism may then be adjusted upward or downward, as warranted by the Commission's experience.[126] The Commission may, at that time, conclude that there are inefficiencies in embedded costs that the Commission may wish to discourage by excluding from IAS. Setting the IAS amount at the high end of the range at this time, however, may commit the Commission to providing universal service support for any inefficient embedded costs reflected in the price cap access rate structure in a manner that would be difficult to reverse. As several commenters note, adjusting the support amount upward at that time may be administratively easier than adjusting the amount downward.[127] Erring toward a conservative support amount--*i.e.*, one that may not permit complete recovery through the universal service fund of the "gap" between SLC revenues and allowable CMT revenues--facilitates proper adjustments when the Commission further addresses interstate access reform for price cap carriers at the end of the transitional period. Moreover, because price cap carriers will retain the ability to recover their allowable CMT revenues through multi-line business PICCs and CCL charges, the consequences of setting the support amount slightly low are less problematic than the consequences of setting the support amount too high.

32. On the other hand, we conclude that a lower support amount than $650 million would not permit price cap carriers to realize significant enough reductions to inefficient rate elements

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[124] *CALLS Order*, 15 FCC Rcd at 13046, para. 201.

[125] *TOPUC*, 265 F.3d at 328.

[126] *See Universal Service First Report and Order*, 12 FCC Rcd at 8929-30, paras. 281-82.

[127] CALLS Comments, Appendix Bt 2 ("By sizing universal service at the lower end of the range indicated by studies in the record . . . the Commission left itself greater latitude in later adjusting that level of support, if necessary, based upon the empirical experience gained during the five years that the size of universal service is to be fixed.")

that contain implicit support, like the multi-line business PICC and the CCL charge.[128] For example, setting the support amount at $593 million, as suggested by the restated NASUCA study, would leave an additional $57 million, or approximately 17 percent, in those inefficient, implicit-support-containing rate elements in the final year of the transitional plan.[129] Thus, the $650 million support amount encourages efficient investment in rural America and allows price cap carriers to recover their permitted revenues while making significant reductions to inefficient rate elements.

33. Based on the foregoing considerations, the record does not indicate that another support amount would better serve the Commission's policy goals. We also note that the CALLS members proposed a $650 million support amount as part of their integrated proposal for resolving several interrelated and difficult issues associated with access charge reform. The $650 million support amount reflects the CALLS plan's comprehensive approach to resolving a number of complicated and interrelated issues. The rules governing the distribution of the IAS reflect the proposed $650 million support amount, and adjusting the amount may have unexpected ramifications with respect to the distribution method. For example, the distribution method was designed to promote competition by creating additional incentives for price cap carriers to deaverage their UNE rates.[130] As the Commission noted in the *CALLS Order*, the fact that both net payers and net recipients of universal service support agreed to the $650 million amount as members of CALLS also indicates strongly that the CALLS plan appropriately balanced the various and divergent interests implicated in access charge reform. The $650 million IAS mechanism, in concert with other reforms to the interstate access rate structure adopted in the *CALLS Order*, has resulted in the $2.6 billion reduction in recovery of common line costs through inefficient rate elements that contain implicit universal service support.[131] Thus, the $650 million amount is part of a "single, cohesive" transitional plan for accommodating the Act's universal service goals with the development of fuller, more rational competition. For all of these reasons, we conclude that the record in this proceeding supports the Commission's decision to size the IAS mechanism at $650 million.

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[128] As noted above, allowable CMT revenues that cannot be recovered through SLCs and IAS will be recovered through multi-line business PICCs and CCL charges, which are inefficient and contain implicit support. *See* para. 14, *supra*. Reducing the size of the IAS mechanism will create a dollar-for-dollar increase in recovery from multi-line PICCs and CCL charges.

[129] Setting the support amount at $336 million, as proposed by NASUCA, would leave an additional $214 million, or 65 percent, in the inefficient rate elements.

[130] *See CALLS Order*, 15 FCC Rcd at 13049 para. 206.

[131] From July 1, 1999, to June 30, 2000, prior to the *CALLS Order's* effect, price cap carriers recovered $2.7 billion through PICCs, *see* IAD CALLS Study, Chart 2, and an estimated $688 million through CCL charges. *See* Trends in Telephone Service, Industry Analysis Division, September 1999, at Table 1.4; Trends in Telephone Service, Industry Analysis Division, March 2000, at Table 1.4; Trends in Telephone Service, Industry Analysis Division, December 2000, at Table 1.4. From July 1, 2000, to June 30, 2001, after the *CALLS Order* became effective, price cap carriers recovered $670 million through PICCs and $133 million through CCL charges. *See generally* Tariff Review Plans.

B. The Commission's Selection of a 6.5 Percent X-Factor

34. In its review of the *CALLS Order*, the court remanded to the Commission for further explanation the selection of the 6.5 percent X-factor by which price cap LECs' rates are reduced.[132] The 6.5 percent X-factor in the *CALLS Order* applied to price cap LECs' switched access rates and served as a transitional mechanism to reduce switched access rates to specified target rate levels.[133]

1. Background

35. The X-Factor Prior to the *CALLS Order*. When the Commission first established price cap regulation in 1990, it included a productivity offset in the price cap formula that was meant to represent the amount by which LEC productivity exceeded that of the economy as a whole.[134] This productivity offset became known as the "X-factor" and was applied to reduce the rates in each of the service groups, or "price cap baskets," of the price cap LECs.[135] The productivity factor initially adopted in the *LEC Price Cap Order* included a component based on historical LEC productivity, and an additional productivity obligation of 0.5 percent as a consumer productivity dividend (CPD) to ensure that consumers shared in the anticipated productivity gains in the form of lower rates.[136] The Commission prescribed two productivity factors: a minimum 3.3 percent factor and an optional 4.3 percent factor.[137] Price cap LECs that opted to use the higher 4.3 percent productivity factor were allowed to retain larger shares of their earnings.[138] Pursuant to the *LEC Price Cap Order*, the Commission performed periodic

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[132] *See TOPUC*, 265 F.3d at 328-29. The Commission's 6.5 percent X-factor was applied to reduce price cap LECs' switched access rates. The Commission also adopted a separate X-factor to reduce price cap LECs' special access rates. At the time the *CALLS Order* was adopted and the petitioners sought court review of the order, the X-factor was 3 percent for the special access rates. The petitioners did not challenge, nor does it appear that the court addressed, the X-factor for special access service. We therefore restrict our discussion to the X-factor applicable to switched access service.

[133] *See CALLS Order*, 15 FCC Rcd at 13020-21, para. 140.

[134] *See LEC Price Cap Order*, 5 FCC Rcd at 6796, para. 74.

[135] The price cap baskets are broad groupings of LEC services. Each basket is subject to its own price cap. The Commission initially adopted four price cap baskets: (1) common line services; (2) traffic sensitive services; (3) special access services; and (4) interexchange services. The Commission applied a separate, lower productivity factor of 3 percent to the interexchange services basket because its evaluation of LEC productivity included only interstate access activity; therefore, the record did not support a higher productivity factor for LEC interexchange services. *See LEC Price Cap Order*, 5 FCC Rcd at 6811, paras. 200-201, 206. In 1994 the Commission removed transport services from the traffic sensitive basket and combined them with special access services to create a new trunking basket. *See Transport Rate Structure and Pricing*, CC Docket No. 91-213, Second Report and Order, 9 FCC Rcd 615, 622, para. 12 (1994).

[136] *See LEC Price Cap Order*, 5 FCC Rcd at 6796, paras. 74-75.

[137] *See LEC Price Cap Order*, 5 FCC Rcd at 6787, 6796, paras. 5, 74.

[138] Initially, price cap LECs were required to share a portion of their earnings in excess of specified rates of return with their access customers by temporarily reducing the price cap ceiling in a subsequent period. The price cap (continued....)

reviews of the price cap regime.[139] After the first performance review in 1995, the Commission found that the initial productivity factor was too low, and increased the minimum productivity factor from 3.3 percent to 4.0 percent.[140] The Commission also provided two optional productivity factors of 4.7 and 5.3 percent.[141] In the next price cap performance review in 1997, the Commission increased the productivity factor to 6.5 percent for all price cap LECs.[142] This productivity factor prescription primarily relied on a staff study of the historical rate of growth in LEC total factor productivity (TFP).[143]

36. Several entities filed petitions for review of the *1997 Price Cap Review Order* with the United States Court of Appeals for the D.C. Circuit. In *USTA v. FCC*, the court reversed and remanded for further explanation the Commission's prescription of a 6.5 percent productivity factor, although it affirmed the order against the petitioners' remaining challenges.[144] The court rejected the Commission's stated rationales for selecting 6.0 as the historical component of the productivity factor, and sought further explanation of the Commission's choice of a 0.5 percent CPD component.[145] The court withheld issuance of its mandate, pending the Commission's reconsideration of the productivity factor, through June 30, 2000.[146]

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sharing requirement established three sharing zones determined by specified rate-of-return levels. In the first "no sharing zone," price cap LECs were allowed to keep all of their earnings up to the first rate-of-return ceiling. Above that ceiling, in the "50-50 sharing zone," price cap LECs were entitled to retain 50 percent of their earnings and were required to return 50 percent of their earnings to ratepayers up to the second ceiling. Price cap LECs were required to return 100 percent of any earnings above the "50-50 sharing zone" ceiling to ratepayers. *See LEC Price Cap Order*, 5 FCC Rcd at 6801-02, paras. 122-26.

[139] *See LEC Price Cap Order*, 5 FCC Rcd at 6789, para. 20.

[140] *See Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, First Report and Order, 10 FCC Rcd 8961, 9053-54, para. 209 (1995) (*1995 Price Cap Review Order*).

[141] *See 1995 Price Cap Review Order*, 10 FCC Rcd 8961 at 9055-56, paras. 213-15. No sharing obligations were imposed on LECs that chose the highest productivity factor of 5.3 percent. *See id.* at 9057-58, paras. 220-22.

[142] *See Price Cap Performance Review for Local Exchange Carriers*, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, 12 FCC Rcd 16642, 16645, para. 1 (1997) (*1997 Price Cap Review Order*). The Commission also eliminated the sharing requirements. *Id.*

[143] *See 1997 Price Cap Review Order*, 12 FCC Rcd at 16645, 16693-98, paras. 1, 133-43. TFP measurement is a methodology commonly used to measure productivity and productivity growth in the economy as a whole. Productivity is measured as the ratio of an index of the outputs of a firm (or industry, or nation) to an index of its inputs. Productivity growth is measured by changes in this ratio over time. The 1997 staff TFP study calculated the historical difference in productivity growth between LECs and the economy nationwide for the period 1986 through 1995. Specifically, it calculated the differential reflecting the difference in the rate of change of LEC input prices as compared with the economy as a whole. These two factors were then added together for each year. *Id.* at 16696, para. 138.

[144] *See USTA v. FCC*, 188 F.3d 521, 530 (D.C. Cir. 1999) (*USTA*).

[145] *See USTA*, 188 F.3d at 525-28.

[146] *See USTA v. FCC*, Order, No. 97-1469 *et al.* (D.C. Cir. June 21, 1999); *USTA v. FCC*, Order, No. 97-1469 *et*
(continued....)

37. The *CALLS Order* X-Factor. On May 31, 2000, the Commission reformed its price cap regulation regime in the *CALLS Order*.[147] The rulemaking leading to adoption of the *CALLS Order* was initiated by the Commission in response to a proposal put forth by CALLS.[148] Among other things, this proposal changed the price cap basket structure by separating trunking services and special access services into two separate baskets.[149] The Commission adopted CALLS' proposal to reduce the rates for the traffic sensitive switched access services and transport services baskets to specified average traffic sensitive (ATS) target rates.[150] CALLS proposed that price cap LECs would reduce their ATS rates over time by applying an annual reduction of 6.5 percent until the target rates are reached.[151] This transitional mechanism was called an "X-factor," although the Commission made clear that it was not tied to productivity, but was merely meant to reduce rates to the target levels at a reasonable pace over the course of the five-year period of the CALLS proposal.[152] The Commission stated, "During the five-year term of the CALLS Proposal, the X-factor as adopted herein will not be a productivity factor as it has been in past price cap formulas. Instead, the X-factor is now a transitional mechanism to lower access charges to target rates for switched access . . . ."[153]

38. Court Decision. In challenging the *CALLS Order* before the United States Court of Appeals for the Fifth Circuit, petitioner NASUCA raised several issues regarding the 6.5 percent X-factor. First, NASUCA argued that the D.C. Circuit previously had rejected use of a 6.5 percent X-factor in *USTA v. FCC*.[154] Second, NASUCA argued against the targeting of the 6.5 percent reductions to the ATS rates (i.e., switched access usage rates) as opposed to applying them to local loop rates (the CMT elements).[155] Third, NASUCA argued that the X-factor reduction should not be set equal to inflation after the target rates are reached.[156] In its decision,

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al. (D.C. Cir. Apr. 13, 2000).

[147] *See generally CALLS Order*, 15 FCC Rcd 12962.

[148] CALLS consisted of several price cap LECs and IXCs. *See* note 2, *supra*.

[149] *See CALLS Order*, 15 FCC Rcd at 13021, 13025, paras. 141, 149; 47 C.F.R. § 61.42(3), (5). After the *CALLS Order*, there are five price cap baskets for: (1) common line, marketing and transport interconnection charge (CMT) elements; (2) traffic sensitive switched interstate access elements; (3) trunking services; (4) interexchange services; and (5) special access services.

[150] The target rates are $0.0055 for regional Bell Operating Companies; $0.0095 for very low-density price cap LECs, and $0.0065 for other price cap LECs. *See CALLS Order*, 15 FCC Rcd at 13021-22, para. 142; 47 C.F.R. § 61.3(qq).

[151] *See CALLS Order*, 15 FCC Rcd at 13020-21, para. 140.

[152] *See CALLS Order*, 15 FCC Rcd at 13028, para. 160.

[153] *See CALLS Order*, 15 FCC Rcd at 13028, para. 160.

[154] *See* Initial Brief for Petitioner National Association of Regulatory Utility Consumer Advocates (NASUCA), 5th Cir. Case No. 00-60434 at 56 (filed Sept. 20, 2000) (NASUCA Initial Brief).

[155] *See* NASUCA Initial Brief at 56. *See also* note 40, *supra* (defining CMT revenue).

the court remanded to the Commission only the issue of the selection of the 6.5 percent X-factor.[157]

2. Discussion

39. In its decision, the court affirmed several important components of the Commission's *CALLS Order*. Specifically, the court upheld the Commission's authority to set access charge rates that are not based on forward-looking cost, so long as they are just, reasonable and nondiscriminatory as required by sections 201(b) and 202(a) of the Communications Act, thus leaving intact the Commission's adoption of the target ATS rates.[158] The court also left intact the Commission's decision to target the X-factor's reductions to switched access services as opposed to common line services, and to adjust the X-factor to the rate of inflation after the ATS target rates are met. Finally, the court did not find unreasonable the Commission's use of the X-factor as a transitional mechanism for reducing rates, as opposed to a productivity factor.[159] The only issue related to the X-factor remanded by the court for further explanation was the Commission's basis for picking the precise figure of 6.5 percent as the transitional X-factor.[160]

40. Using 6.5 percent as a transitional X-factor was the Commission's reasoned approach to reconciling the competing goals of moving traffic-sensitive access charges closer to cost-based rates while avoiding a flash cut.[161] The Commission wanted to ensure that ATS rates reached the target levels within a reasonable period of time to ensure that consumers reaped the benefits of the *CALLS Order* as soon as possible. Some commenters, however, argued that the Commission should avoid a flash cut of access charge rates, which could harm competition.[162] Moreover, the Commission previously has held that flash cuts in access rates should be avoided to provide LECs, IXCs, and end users time to adjust to changes in rate structures.[163] Thus, the Commission

(Continued from previous page)
[156] *See* NASUCA Initial Brief at 56. In the *CALLS Order*, the Commission found that, once a price cap LEC reached the applicable ATS target rate, the 6.5 percent reduction factor would be set to equal inflation, which, under the price cap formula for these services, essentially would freeze the price caps for services in the traffic sensitive switched access and trunking services baskets. *See CALLS Order*, 15 FCC Rcd at 13022, 13029, paras. 144, 163.

[157] *See TOPUC*, 265 F.3d at 329.

[158] *See TOPUC*, 265 F.3d at 324; 47 U.S.C. §§ 201(b), 202(a).

[159] Indeed, the court explicitly recognized that the X-factor "is no longer tethered to any productivity measure." *TOPUC*, 265 F.3d at 329.

[160] *See TOPUC*, 265 F.3d at 329.

[161] *See CALLS Order*, 15 FCC Rcd at 13036-37, paras. 178-179.

[162] *See* Letter from Donald F. Shepheard, Vice President Federal Regulatory Affairs & Policy, Time Warner Telecom, to Magalie R. Salas, Secretary, FCC, CC Docket Nos. 96-262, 94-1, 99-249, and 96-45 (May 8, 2000).

[163] *See Access Charge Reform First Report and Order*, 12 FCC Rcd at 15987, 16083, paras. 9, 234 (adopting a gradual, market-based approach, rather than a flash cut, in eliminating implicit subsidies in interstate access charges and in migrating usage-based charges into flat-rated charges). *Cf. Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9937, para. 37 (2001) (declining to flash cut competitive LEC access rates to the level of the competing incumbent LEC and finding that a (continued....)

adopted a transitional X-factor to reduce ATS rates, in order to avoid the harms associated with a flash cut.

41. Having rejected an immediate reduction to target levels, the Commission then had to determine the most reasonable X-factor to apply. In doing so, it was necessary for the Commission to consider a number of criteria: which factor would work best for the broadest range of carriers; which factor could be most easily understood and implemented; and which factor was best supported by record evidence submitted by all parties. The 6.5 percent X-factor best fit these criteria, and was thus the most reasonable choice for the Commission to make. The 6.5 percent X-factor had been in place, although subject to a remand order, since 1997. Indeed, commenters in the *CALLS Order* proceeding did not propose any amount other than 6.5 percent for the transitional X-factor.[164] The Commission determined that the transitional mechanism, featuring a 6.5 percent X-factor, would achieve the goal of reducing rates over a reasonable time period, without reducing rates too quickly so as to harm LECs. The Commission was able to rely on the fact that the 6.5 percent transitional X-factor was proposed by CALLS, a group that included both price cap LECs and IXCs, as evidence that it reduced rates at a reasonable pace, i.e., not too quickly so as to harm LECs, but fast enough that the benefits of the rate reductions would flow to IXCs and their end-user customers in a timely manner.

42. The court has recognized the legitimacy of the Commission's reliance on its expertise in setting rates.[165] In *NARUC*, the court upheld the Commission's development of a $25 private line surcharge, even though this charge was "an estimate based upon assumptions drawn from the collective experience of the Commission."[166] The record was inadequate to allow the Commission to derive a more precise rate; therefore the court found that it was reasonable for the Commission to rely on its expertise in setting the rate.[167] In the case of the 6.5 percent X-factor, the record did not provide any number other than 6.5 percent as the transitional mechanism. No party argued that 6.5 percent was an unreasonable number for the Commission to use as a transitional mechanism. Furthermore, the Commission had experience with using a 6.5 percent X-factor previously. It was therefore familiar with the types of reductions that could be expected from using this number, as opposed to some other number that no party had proposed, and that had not been used previously to reduce rates. As discussed above, the Commission relied on its expertise in determining that the 6.5 percent X-factor would achieve the policy goals of reducing ATS rates to target levels in a timely manner that would not harm LECs.

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gradual transition is more appropriate).

[164] ALTS/Time Warner submitted a proposal to use the 6.5 percent transitional X-factor, but to target 50 percent of the X-factor to ATS rates and 50 percent to CMT rates. *See* Joint Comments of the Association for Local Telecommunications Services and Time Warner Telecom, CC Docket Nos. 96-262, 94-1, 99-249, 96-45 at 16 (filed Apr. 3, 2000).

[165] *See Nat'l Ass'n of Regulatory Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984) (*NARUC*).

[166] *NARUC*, 737 F.2d at 1139.

[167] *NARUC*, 737 F.2d at 1140.

43. Before adoption of the *CALLS Order* in 2000, Commission staff analyzed the potential effects of adopting the CALLS plan when compared to the access charge regulations in existence at the time.[168] In that analysis, IAD predicted when price cap carriers would reach their target rates using a 6.5 percent X-factor.[169] According to the IAD CALLS Study, carriers representing the following percentages of total access lines would reach their target rates: 6 percent in 2000; another 42 percent for a total of 48 percent in 2001; another 26 percent for a total of 74 percent in 2002; and another 22 percent for a total of 96 percent in 2003.[170] The application of the 6.5 percent X-factor has yielded results strikingly similar to those predicted by IAD in 2000. Price cap LEC companies that met their target ATS rates immediately upon filing their 2000 annual access filings represent approximately 58 million access lines, or 36 percent of the approximately 163 million total access lines.[171] In 2001, companies representing another 39 percent met their ATS target rates, for a total of 75 percent.[172] In 2002, companies representing another 21 percent met their ATS target ATS rates, for a total of 96 percent.[173] There are only approximately 6 million lines, or 4 percent of the total, served by price cap LEC companies that have not yet met their target ATS rates.[174] These companies will continue to apply the 6.5 percent transitional X-factor to reduce their ATS rates. We note that companies representing approximately 3 million access lines were very close to meeting their ATS target rates in their 2002 annual access filings, and it is likely that these companies will meet the target rates in their 2003 access filing.[175] Therefore, we expect that, after the 2003 access filing, price cap LECs that have not reached their ATS target rates will represent fewer than 3 million lines, or 2 percent of total access lines, with companies representing 98 percent at their target rates. Actual application of the 6.5 percent X-factor generally followed Commission staff's predictions on when companies would reach their target rates, establishing a timely transition path and bringing benefits to consumers in a timely manner.

44. Application of a significantly different X-factor would have had very different consequences.[176] A higher X-factor would have reduced the price cap companies' ATS rates to

[168] *See* IAD CALLS Study.

[169] IAD CALLS Study at App. E.

[170] IAD CALLS Study at App. E. Approximate line counts from the carriers' 2002 annual access filings were used to determine the percentage of total access lines at the target levels in each year of the IAD CALLS Study.

[171] *See* Appendix B. Approximate access line counts for the price cap LEC companies are based on the 2002 annual access filings.

[172] *See* Appendix B.

[173] *See* Appendix B.

[174] *See* Appendix B.

[175] *See* Appendix B. For purposes of this analysis, we expect that companies with 2002 annual access tariff ATS rates less than $0.001 above their target rates are likely to reach the ATS target rates in their 2003 annual access tariff filings.

[176] An X-factor slightly higher or lower than 6.5 percent, however, would not have had much impact on the (continued....)

the target levels at a faster rate, thereby possibly harming those smaller price cap companies that have not yet met the target rates. A lower X-factor would have reduced price cap companies' ATS rates to the target levels at a slower rate; therefore, IXCs and their end-user customers would not have received the benefits of these lower rates in as timely a manner. The Commission relied on the record before it and its expertise in selecting a 6.5 percent X-factor in 2000, and this X-factor has achieved the Commission's policy goals of reducing ATS rates in a timely manner without harming price cap companies by cutting rates too quickly.

45. The Commission's selection of a 6.5 percent X-factor as a transitional mechanism for moving to ATS target rates was based on the record before it. Indeed, the Commission was without a reasoned basis for selecting an alternative, transitional X-factor. The Commission's selection of a 6.5 percent X-factor in 2000 will bring ATS access charges to the target levels for price cap LECs representing at least 98 percent of total price cap access lines after the July 2003 annual access filing. This percentage represents reasonable levels of lines reaching the ATS target rates during the third and fourth years of the five-year CALLS proposal. The benefits of lower access charges are being provided to consumers in a timely manner as envisioned by the Commission in the *CALLS Order*. The remaining carriers continue to move toward the target rates in a manner that provides meaningful consumer benefits, while avoiding the kind of dramatic rate cut that, as the Commission previously discussed, could harm LECs. Although 6.5 percent is not the only possible transitional mechanism that the Commission could have adopted, for the reasons articulated above, it represents a reasonable exercise of the Commission's discretion in setting rates.

IV. PROCEDURAL MATTERS

A. Supplemental Final Regulatory Flexibility Certification

46. The Regulatory Flexibility Act of 1980, as amended (RFA)[177] requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities."[178] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[179] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[180] A small business concern is one which: (1) is independently owned and

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timetable. Most carriers would have reached their target ATS rates on the same time schedule in that case.

[177] The RFA, *see* § 5 U.S.C. S 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[178] 5 U.S.C. § 605(b).

[179] 5 U.S.C. § 601(6).

[180] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. S § 632).

operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[181]

47. On May 31, 2000, the Commission adopted the *CALLS Order*, which reformed the interstate access rate structure and created a new universal service mechanism, Interstate Access Support (IAS), for price cap carriers.[182] On September 10, 2001, the Fifth Circuit affirmed the *CALLS Order* in most respects, but remanded for further analysis and explanation the decisions to size the IAS mechanism at $650 million and to adopt the 6.5 percent X-factor.[183] Specifically, with respect to the $650 million size of the IAS mechanism, the court concluded that, while identifying a specific amount of support is an imprecise exercise, the Commission must better explain how it arrived at the $650 million amount.[184] Similarly, the court found that the Commission must demonstrate a rational basis for its derivation of the 6.5 percent X-factor.[185]

48. In this Order on Remand, we provide further analysis and explanation as required by the court, but do not adopt any changes to the Commission's prior decisions. With respect to the $650 million IAS mechanism, we examine each of the studies in the record to determine the range of reasonable estimates of implicit support to be replaced by explicit support,[186] and then explain why, in our independent judgment, $650 million is the most appropriate amount of implicit support within this range to replace with explicit support.[187] Specifically, we conclude that by conservatively setting the support amount at $650 million, we ensure that a substantial portion of the gap between SLC revenues and allowable CMT revenues will be covered by support, while minimizing the risk that the support amount will be too large. We also further explain the Commission's reasoned approach in the *CALLS Order* in adopting the transitional 6.5 percent X-factor as a means of achieving reductions in traffic-sensitive rates while avoiding a flash cut in access rates that could harm competition.[188] Specifically the Commission considered all relevant criteria, include which factor would work best for the broadest range of carriers; which factor could be most easily understood and implemented; and which factor was best supported by record evidence submitted by all parties. The 6.5 percent X-factor best fit these criteria, and was thus the most reasonable choice for the Commission to make. Because this Order on Remand does not change either $650 million IAS mechanism or the 6.5 percent X-factor, no economic impact of any kind result from our action. Therefore, we certify that this Order on Remand will not have a significant economic impact on a substantial number of small

[181] Small Business Act, § 15 U.S.C. S 632.

[182] *CALLS Order*, 15 FCC Rcd 12962; *see id.* at 13071-76 paras. 251-63 (Final Regulatory Flexibility Analysis).

[183] *TOPUC*, 265 F.3d at 317.

[184] *Id.* at 328; *see also* para. 17, *infra*.

[185] *TOPUC*, 265 F.3d at 328-29; *see also* para. 38, *infra*.

[186] *See supra* paras. 20-29.

[187] *See supra* paras. 30-33.

[188] *See supra* paras. 39-45.

entities.

49. The Commission will send a copy of this Order on Remand, including a copy of this supplemental certification, in a report to Congress pursuant to the Congressional Review Act.[189] In addition, this Order on Reconsideration and supplemental final certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.[190]

B. Paperwork Reduction Act Analysis

50. The decision herein has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104-13, and found to impose no new or modified reporting and/or recordkeeping requirements or burdens on the public.

V. ORDERING CLAUSES

51. IT IS ORDERED, pursuant to sections 1, 4(i) and (j), 201-209, 218-222, 254, and 403 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-209, 218-222, 254, and 403, that this Order IS HEREBY ADOPTED as described above.

52. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Order on Remand, including the Supplemental Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATION COMMISSION

Marlene H. Dortch
Secretary

[189] *See* 5 U.S.C. § 801(a)(1)(A).

[190] *See* 5 U.S.C. § 605(b).

Appendix A

FCC Staff Restatement Analysis of NASUCA Forward-Looking Cost Model

Introduction

NASUCA filed reply comments in this proceeding describing a forward-looking cost study which indicated that the Interstate Access Support (IAS) mechanism adopted in the *CALLS Order* would be appropriately sized at $629 million if SLCs were capped at $5.00 and $336 million if SLCs were capped at $6.50. On May 29, 2002, NASUCA filed ex parte letters further detailing its study. As discussed in the Order, the Commission concludes that the NASUCA study should be restated to eliminate certain assumptions.[1] The following sets forth the Commission staff's restatement analysis of NASUCA's study.

Restatement

1. NASUCA's Assumptions Related to Structure Sharing and Traffic-Sensitive Costs

In its study (or "preferred scenario"), NASUCA makes certain changes to the Commission's Synthesis model in order to permit structure sharing between the feeder and distribution networks and to remove loop costs that it considers to be traffic-sensitive in nature. In order to estimate the amount of support using NASUCA's methodology, but without relying on these assumptions, Commission staff referred to the results of the "default scenario" submitted by NASUCA in the Cost Review proceeding.[2] This default scenario produces forward-looking costs that do not rely on NASUCA's changed assumptions.[3] Using these costs in NASUCA's methodology increases the estimate support from $336 million to $516 million, as shown in Table 1 below.

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1 *See* para. 29, *supra*.

2 In the SLC Cost Review Proceeding, NASUCA submitted several studies describing different model outputs resulting from different "scenarios," or sets of assumptions factored into the model. NASUCA Comments in CC Docket Nos. 96-262, 94-1, and 96-45 (filed January 24, 2002). These scenarios included the "default scenario," which utilized the Commission's model without changes and the scenario which herein is referred to at the "NASUCA preferred scenario," which make changes to the Commission's model consistent with NASUCA's arguments that certain costs should be removed from the model. NASUCA submitted these studies in Excel format, calling the file containing the default scenario "wc_cost" and calling the file contained its preferred scenario "wc_cost_dlcts."

3 NASUCA's default scenario does include changed assumptions regarding the attribution of corporate overhead costs to the loop as compared to previous Commission uses of the Synthesis model. *See* para. 28, *supra*. Commission staff has not estimated the impact of this change by NASUCA.

Table 1.

NASUCA Preferred Scenario	(in millions)	Source
NASUCA Preferred Scenario at $5.00 SLC Cap		
76 price cap, non-rural study areas with UNE Zones	$472	L1=NASUCA Preferred Scenario
Additional 105 study areas	$157	L2=USAC data
Total	$629	L3=L1+L2
NASUCA Preferred Scenario at $6.50 SLC Cap		
76 price cap, non-rural study areas with UNE Zones	$252	L4=NASUCA Preferred Scenario
NASUCA Factor	53.39%	L5=L4 / L1
Additional 105 study areas	$84	L6=L2 x L5
Total	$336	L7 = L4+L5
FCC Staff Analysis of NASUCA Study		
NASUCA Default Scenario at $5.00 SLC Cap		
76 price cap, non-rural study areas with UNE Zones	$685	L1=NASUCA Default Scenario
Additional 105 study areas	$157	L2=USAC data
Total	$842	L3=L1+L2
NASUCA Default Scenario at $6.50 SLC Cap		
76 price cap, non-rural study areas with UNE Zones	$419	L4=NASUCA Default Scenario
NASUCA Factor Recomputed	61.17%	L5=L4 / L1
Additional 105 study areas	$96	L6=L2 x L5
Total	$516	L7 = L4+L5

As shown in Table 1, for the $5.00 SLC cap, the NASUCA preferred scenario calculates a forward-looking support amount of $472 M, to which is added another $157 M of support for 105 study areas not included in the model. For the $6.50 SLC cap, the NASUCA preferred scenario calculates a forward-looking support amount of $252 M, to which is added another $84 M of support for 105 study areas not included in the model. The $84 M is derived using a

NASUCA factor, more fully explained in NASUCA pleadings.[4] A total of $336 M in support is calculated.

For the $5.00 SLC cap, the NASUCA <u>default scenario</u> calculates a forward-looking support amount of $685 M, to which is added another $157 M of support for 105 study areas not included in the model. For the $6.50 SLC cap, the NASUCA default scenario calculates a forward-looking support amount of $419 M, to which is added another $96 M of support for 105 study areas not included in the model. The $96 M is derived using a modified NASUCA factor computed in the same manner as the original factor.[5] A total of $516 M in support is calculated.

2. NASUCA's Exclusion of Multi-Line Business Lines

The NASUCA study also fails to include SLC revenues and costs for multi-line business (MLB) lines. To include these MLB lines in the NASUCA default scenario, Commission staff modified the worksheet (resbusbyzone) in wc_cost so that the SLC revenues and costs are computed to include MLB lines.[6] This was accomplished in the following manner. The MLB lines are already displayed in a separate column in the same worksheet. The formulas in the columns labeled "SLC revenues" and "economic costs" were modified.

The SLC revenue formulas must be changed to reflect the relevant SLC caps. These SLC caps were obtained from publicly available CMT revenue per line data. For example, SWB-AK's CMT revenue per line = $5.20, therefore SLC revenues at a $5.00 residential and single line business cap = (($5.20*MLB lines) +$5.00*(SLB lines + residential lines))*12]. For another example, GTE NW-WA (Contel)'s CMT revenue per line is $9.37, therefore SLC revenues at a $6.50 residential and single-line business cap = [(9.20*MLB lines) + $6.50*(SLB lines + residential lines))*12]. The SLC revenues computed for a company reflect the CMT revenue per line for the company, which in turn determines which caps are effective for that company.

The cost formulas in the column labeled "economic costs" were modified to include the MLB lines (i.e., economic cost = cost per line*12*(SLB lines + residential lines + MLB lines). Once these changes are made, the spreadsheet performs the calculations for support amounts. The results are shown in Table 2.

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4 NASUCA Reply at 12.

5 NASUCA Reply at 12.

6 *See* note 2, *supra.*

Table 2.
FCC Staff Analysis of NASUCA Study Including MLB Lines

(in millions)

Restated NASUCA Forward-Looking Support at $5.00 SLC		
76 price cap, non-rural with UNE Zones	$712	L1= NASUCA default plus MLB
Additional 105 study areas	$157	L2=USAC data
Total	$869	L3=L1+L2
Restated NASUCA Forward-Looking Support at $6.50 SLC		
76 price cap, non-rural with UNE Zones	$485	L4= NASUCA default plus MLB
NASUCA Factor Recomputed	68.12%	L5=L4 / L1
Additional 105 study areas	$107	L6=L2 x L5
Total	$593	L7 = L4+L5

For the $5.00 SLC cap, the NASUCA default scenario including MLB calculates a support amount of $712 M, to which is added another $157 M of support for 105 study areas not included in the model. For the $6.50 SLC cap, the NASUCA default scenario including MLB calculates a support amount of $485 M, to which is added another $107 M of support for 105 study areas not included in the model. The $107 M is derived using a modified NASUCA factor computed in the same manner as the original factor.[7] A total of $593 M in support is calculated.

Results

Removing NASUCA's assumptions regarding traffic-sensitive costs and structure sharing from the NASUCA preferred scenario raises the amount of support from $336 M to $516 M. Including the MLB lines raises support from $516 M to $593 M.

[7] NASUCA Reply at 12.

APPENDIX B

Companies Reaching ATS Target Rates in 2000 Annual Access Filing		
Company (TRP Name)	Date ATS Rate Reached[•]	Approximate Access Lines[†]
BellSouth (bstran)	8/1/2000	23,711,051
Cincinnati Bell (cbtcan)	6/16/2000	1,024,941
Citizens Group 4 (ctc4an)	8/17/2000	309,044
Iowa Telecommunications (coitan)	7/27/2000	166,290
Sprint Nevada (cenvan)	7/27/2000	879,230
Sprint North Carolina (ucncan)	7/27/2000	1,490,285
Sprint Southeast (ucsean)	7/27/2000	767,102
Valor Oklahoma (vaokan)	7/27/2000	121,454
Valor Texas (vctxan)	7/27/2000	142,348
Valor Texas (vatxan)	7/27/2000	175,610
Verizon Alabama (coalan)	7/27/2000	125,572
Verizon California (gtcaan)	7/27/2000	4,180,621
Verizon East – South (batran)[+]	7/27/2000	21,312,646
Verizon Florida (gtflan)	7/27/2000	2,302,687
Verizon Kentucky (cokyan)	7/27/2000	102,126
Verizon Missouri (gtmoan)	7/27/2000	95,715
Verizon Nevada (convan)	7/27/2000	38,685
Verizon North Carolina (concan)	7/27/2000	140,159
Verizon Pennsylvania (coptan)	7/27/2000	114,782
Verizon Pennsylvania (gtpaan)	7/27/2000	557,794
Verizon Virginia (covaan)	7/27/2000	596,299
Verizon Virginia (gtvaan)	7/27/2000	37,138
Total Lines:		58,391,579 (36% of total nationwide access lines)

[•] The dates are based on those reported by the price cap companies at line 475 of the TGT-1 form in their 2002 annual access tariff review plan (TRP) filings.

[†] Approximate access line counts for the price cap LEC companies are based on these companies' 2002 annual access TRP filings, CAP-1 form, line 130. The line count information is annualized in the TRP filing. We have adjusted the annualized line count information to represent the average number of lines in use on a monthly basis. Based on the 2002 TRP filings, the price cap companies have approximately 163,372,660 monthly total lines.

[+] As reported by Verizon in its April 10, 2003 *ex parte* filing, the former Bell Atlantic entity reached the ATS target rate in the 2000 annual filing. Line counts for the former Bell Atlantic entity are based on the 2002 annual access filing. Letter from Richard T. Ellis, Director - Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262, 94-1, 99-249, and 96-45 (filed Apr. 10, 2003) (Verizon Apr. 10 *Ex Parte* Letter).

Companies Reaching ATS Target Rates in 2001 Annual Access Filing		
Company (TRP Name)	Date ATS Rate Reached*	Approximate Access Lines†
Ameritech (amtran)	6/18/2001	20,160,284
Citizens Group 5 (ctc5an)	7/3/2001	16,688
Frontier – Rochester Tier I (rtnyan)	6/18/2001	505,442
Iowa Telecommunications (gtiaan)	6/18/2001	121,037
Pacific Bell (ptcaan)	5/7/2001	17,669,307
Qwest (ustran)	7/27/2001	16,820,389
Sprint Florida (ucflan)	6/18/2001	2,147,259
Sprint East (utegan)	6/18/2001	634,060
Valor New Mexico (vanman)	6/18/2001	46,687
Verizon Alabama (gtalan)	8/7/2001	166,076
Verizon California (cocaan)	8/7/2001	396,213
Verizon Illinois (coilan)	8/7/2001	136,016
Verizon Indiana (coinan)	8/7/2001	196,011
Verizon Indiana (gainan)	8/7/2001	772,588
Verizon North Carolina (gtncan)	8/7/2001	217,956
Verizon Ohio (gtohan)	8/7/2001	929,637
Verizon Oregon (gtoran)	8/7/2001	474,800
Verizon South Carolina (gtstan)	8/7/2001	214,442
Verizon Texas (cotxan)	8/7/2001	114,399
Verizon Texas (gttxan)	8/7/2001	1,568,135
Verizon Washington (cowaan)	8/7/2001	88,259
Verizon Washington (gtwaan)	8/7/2001	785,108
Total Lines:		64,180,793 (39% of total nationwide access lines) (75% at target rates)

* The dates are based on those reported by the price cap companies at line 475 of the TGT-1 form in their 2002 annual access tariff review plan (TRP) filings.

† Approximate access line counts for the price cap LEC companies are based on these companies' 2002 annual access TRP filings, CAP-1 form, line 130. The line count information is annualized in the TRP filing. We have adjusted the annualized line count information to represent the average number of lines in use on a monthly basis. Based on the 2002 TRP filings, the price cap companies have approximately 163,372,660 monthly total lines.

Companies Reaching ATS Target Rates in 2002 Annual Access Filing		
Company (TRP Name)	Date ATS Rate Reached[*]	Approximate Access Lines[†]
SWBT (swtran)	7/2/2002	14,490,907
Sprint Indiana (utinan)	7/2/2002	269,421
Sprint Midwest (utmwan)	7/2/2002	1,010,581
Verizon East – North (nxtran)[+]	7/2/2002	16,423,404
Verizon Illinois (gailan)	7/2/2002	704,829
Verizon Kentucky (gtkyan)	7/2/2002	457,694
Verizon Michigan (gamian)	7/2/2002	795,676
Verizon Minnesota (comtan)	7/2/2002	255,338
Verizon Wisconsin (gtwian)	7/2/2002	400,562
Total Lines:		34,808,412 (21% of total nationwide access lines) (96% at target rates)

[*] To determine which companies reached their target ATS rates in the 2002 annual access filing, we identified the companies that responded "No" at line 475 of the 2002 TRP form TGT-1, asking whether the ATS target rate was met in prior filings. We then compared these companies' proposed ATS rates at line 1120 of the TGT-3 TRP form, with the original target ATS rate at line 470 of the TGT-1 TRP form. Those companies with a proposed ATS rate lower than the target ATS rate met the target as of the effective date of the 2002 annual access filing.

[†] Approximate access line counts for the price cap LEC companies are based on these companies' 2002 annual access TRP filings, CAP-1 form, line 130. The line count information is annualized in the TRP filing. We have adjusted the annualized line count information to represent the average number of lines in use on a monthly basis. Based on the 2002 TRP filings, the price cap companies have approximately 163,372,660 monthly total lines.

[+] As reported by Verizon in its April 10, 2003 *ex parte* filing, the former NYNEX entity reached the ATS target rate in the 2002 annual filing. Line counts for the former NYNEX entity are based on the 2002 annual access filing. Verizon Apr. 10 *Ex Parte* Letter.

Companies Not Yet at Their Target Rates		
Company (TRP Name)	Likely to Reach ATS Rate in 2003 Filing?[‡]	Approximate Access Lines[†]
Aliant (ltnean)	No	278,372
Citizens Group 1 (ctc1an)	No	881,794
Citizens Group 2 (ctc2an)	No	142,834
Citizens Group 3 (ctc3an)	No	23,134
Frontier Minnesota & Iowa (vitcan)	Yes	202,657
Frontier Rochester Tier II (rtcsan)	No	267,188
Nevada Bell (ptnvan)	No	362,684
SNET (snctan)	Yes	2,164,403
Sprint Northwest (utnwan)	No	162,537
Sprint Ohio (utohan)	Yes	631,095
Verizon Arizona (coazan)	No	8,347
Verizon Hawaii (gthian)	No	709,498
Verizon Idaho (gtidan)	No[+]	136,322
Verizon Micronesia (gtmcan)	No	21,011
Total Lines:		5,991,876 (4% of total nationwide access lines)
Total Lines Likely to Reach ATS Target Rate in 2003:		2,998,155 (2% of total nationwide access lines) (98% at target rates after 2003 filing)

‡ For purposes of this analysis, we expect that companies with 2002 annual access tariff ATS rates less than $0.001 above their target rates are likely to reach the ATS target rates in their 2003 annual access tariff filings.

† Approximate access line counts for the price cap LEC companies are based on these companies' 2002 annual access TRP filings, CAP-1 form, line 130. The line count information is annualized in the TRP filing. We have adjusted the annualized line count information to represent the average number of lines in use on a monthly basis. Based on the 2002 TRP filings, the price cap companies have approximately 163,372,660 monthly total lines.

+ Although the Verizon Idaho entity's 2002 ATS rate is less than $0.001 above its target rate, Verizon claims that it is not likely to reach the ATS target rate in the 2003 annual filing. Verizon Apr. 10 *Ex Parte* Letter.

EXHIBIT 9

Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	CC Docket No. 97-181
Defining Primary Lines	)	

Report and Order & Further Notice of Proposed Rulemaking

Adopted: February 22, 1999 Released: March 10, 1999

Comment Date: April 9, 1999
Reply Date: April 26, 1999

By the Commission: Commissioner Furchtgott-Roth Dissenting in Part and Issuing a Statement

Table of Contents

I. Introduction

1. The Commission's access charge rules set higher caps for the subscriber line charges (SLCs) and presubscribed interexchange carrier charges (PICCs) that price cap local exchange carriers (LECs) may assess on non-primary residential lines and multi-line business lines than on primary residential lines and single line business lines.[1] To promote uniformity in the way price cap LECs assess SLCs and PICCs, we adopt requirements in this Report and Order for differentiating and identifying such lines.

2. We adopt a location-based definition of primary residential line. Under this definition, one residential line that a price cap LEC provides to a particular location will be considered primary. Any other residential lines the price cap LEC provides to the same location shall be deemed non-primary residential lines. For this purpose, a price cap LEC provides a line whether it sells the line to a subscriber or to a competitive LEC that resells the line. We also address how to determine whether businesses are single line or multi-line.

3. The Commission's rules that establish PICCs and set different SLC caps for primary residential lines than for non-primary residential lines apply only to price cap LECs, not to rate-of-return LECs.[2] Consequently, the definition of primary residential line we promulgate in this order shall apply only to price cap LECs. The Commission has sought comment on whether to apply to rate-of-return LECs the rules regarding PICCs and the higher caps for non-primary residential lines, but has not issued an order resolving that issue.[3] Should the Commission decide at a later date to apply such rules to rate-of-return LECs, the Commission will address at that time how to define, identify, and verify primary residential lines and single line business lines for rate-of-return LECs. Thus we do not address issues that the Notice of Proposed Rulemaking raised regarding rate-of-return LECs.[4]

4. We also issue a Further Notice of Proposed Rulemaking in which we tentatively conclude that individuals with speech or hearing disabilities should have access at primary-line rates to one residential line per location for use with a TTY, regardless of whether another line at the location is also treated as primary for residents without such disabilities. We seek comment on this tentative conclusion, and several proposals for implementing it.

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[1] *See* 47 C.F.R. § 69.152(b), (d), (e), (k) (providing means for price cap LECs to calculate the SLC caps for primary and non-primary residential lines, and single line and multi-line business lines); 47 C.F.R. § 69.153(c)-(e) (providing means for price cap LECs to calculate the PICC caps for primary and non-primary residential lines, and single line and multi-line business lines).

[2] *See Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 15998 n.37, 16015 (1997) (Access Charge Reform Order), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

[3] *See Access Charge Reform for Incumbent LECs Subject to Rate-of-Return Regulation*, Notice of Proposed Rulemaking, 13 FCC Rcd 14238, 14251-53 (1998).

[4] *See Defining Primary Lines*, Notice of Proposed Rulemaking, 12 FCC Rcd 13647, 13650 (1997) (Notice).

II. Report and Order

A. Background

5. To provide interstate telecommunications services, interexchange carriers (IXCs) usually rely on some of the telephone infrastructure that incumbent LECs use to provide local telephone service. The incumbent LEC's local loop, for example, connects a customer to the LEC network so that the customer can make and receive intrastate calls. The incumbent LEC's local loop also connects the customer to the networks of IXCs so that the customer can make and receive interstate calls. Consequently, a portion of the costs an incumbent LEC incurs in providing this common infrastructure is allocated to intrastate service and recovered pursuant to state regulation, and a portion is allocated to interstate service and recovered pursuant to regulations of the Federal Communications Commission.[5]

6. The Commission adopted uniform access charge rules in 1983 to govern the way incumbent LECs recover that portion of the costs of the common infrastructure allocated to interstate service.[6] Under these rules, the Commission allows incumbent LECs to recover some of the interstate costs of providing the local loop through a flat, monthly end-user common line charge (EUCL)—sometimes called a SLC—that they assess on end users.[7] The Commission limited the amount of the SLC, however, because of concerns that an excessively high SLC might cause end users to disconnect their telephone service.[8] The Commission allowed the incumbent LECs to recover the remainder of their interstate costs attributable to the local loop through a per-minute carrier common line charge (CCLC) that they assess on IXCs.[9]

7. Under principles of cost-causation, it is most economically efficient for incumbent LECs to recover the costs of providing interstate access in the same way that they incur them. Under such principles, incumbent LECs should recover their traffic-sensitive costs of interstate access through per-minute charges, and should recover their non-traffic-sensitive costs through flat charges. The incumbent LECs' costs of providing the local loop do not change with the number, length, or type of telephone calls customers make, and so are non-traffic sensitive. Because of the cap on SLCs, however, incumbent LECs recover some of these non-traffic-sensitive loop costs through the traffic sensitive CCLC. In its May 1997 *Access Charge Reform Order*, the Commission decided to phase out

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[5] *See, generally*, 47 U.S.C. §§ 151-52 (giving the FCC authority over interstate communications).

[6] *See MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241 (1983 Access Charge Order), *recon.*, 97 FCC 2d 682 (1983), *second recon.*, 97 FCC 2d 834 (1984).

[7] *See 1983 Access Charge Order*, 93 FCC 2d at 243, 279; *Access Charge Reform Order*, 12 FCC Rcd at 16007-08.

[8] *See 1983 Access Charge Order*, 93 FCC 2d at 243, 290; *Access Charge Reform Order*, 12 FCC Rcd at 16007.

[9] *See 1983 Access Charge Order*, 93 FCC 2d at 244, 280; *Access Charge Reform Order*, 12 FCC Rcd at 16007-08.

the CCLC for price cap LECs on the grounds that recovering the non-traffic-sensitive loop costs through traffic-sensitive charges is economically inefficient.[10]

8. To provide price cap LECs with a means to recover some of the loop costs they previously recovered in the CCLC, the Commission raised the price cap LECs' SLC caps for non-primary residential lines and multi-line business lines, but chose not to raise the price cap LECs' SLC caps for primary residential lines and single line business lines.[11] For 1999, the SLC cap for price cap LECs is $3.50 per month for each primary residential and single line business line, $6.07 per month for each non-primary residential line, and $9.20 per month for each multi-line business line.[12] To address concerns that charging a higher SLC for non-primary residential lines sold by price cap LECs might encourage subscribers to obtain their additional residential lines from resellers, the Commission decided in the *Access Charge Reform Order* to allow price cap LECs to charge the higher SLC to carriers that resell price-cap LECs' lines if the lines are non-primary.[13]

9. Because the SLC caps on residential and single line business lines would prevent most price cap LECs from recovering through the SLC all the costs they formerly recovered through the CCLC, the Commission also created the PICC: a flat, per-line charge that price cap LECs may assess on an end user's presubscribed IXC.[14] As with the SLC, the Commission set higher PICC caps for non-primary residential lines and multi-line business lines than for primary residential lines and single line business lines.[15] Through June 30, 1999, the PICC cap is $0.53 per month for each primary residential and single line business line, $1.50 per month for each non-primary residential line, and $2.75 per month for each multi-line business line.[16] As a result of the various caps, the lines of customers that subscribe to single residential or business lines are not assessed the entire cost of the loops. Until the access reform rate structure is fully phased in, these lines are subsidized by customers that subscribe to multiple business lines.

10. The Commission sought comment in a September 1997 notice of proposed rulemaking (Notice) on whether to modify its rules to provide for the definition, identification, and verification of

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10 *See Access Charge Reform Order*, 12 FCC Rcd at 15998-99, 16004, 16007-08, 16012-14.

11 *See id.* at 15999-16000, 16004-05, 16008-17.

12 *See* 47 C.F.R. § 69.152.

13 *See Access Charge Reform Order*, 12 FCC Rcd at 16017; 47 C.F.R § 69.152(e)(3).

14 *Access Charge Reform Order*, 12 FCC Rcd at 15999-16000, 16004-05.

15 *See id.* at 16004-05, 16020, 16022. *See also* 47 C.F.R. § 153(c)-(e).

16 *See* 47 C.F.R. § 153(c)-(e); *Access Charge Reform*, CC Docket No. 96-262, Third Order on Reconsideration, FCC 98-257 (rel. Oct. 5, 1998) (extending date for increase of PICC caps from January 1, 1999, to July 1, 1999).

primary residential lines and single line business lines.[17] Choosing appropriately balanced definitions is important because as primary residential and single line business line counts increase, so, too, does the subsidy that multi-line business line customers must bear during the phase-in of the access reform rate structure.

B. Definition of Primary Residential Line

1. Background

11. The Commission's rules currently do not define "primary residential line." The Commission sought comment in the *Notice* on whether to define the primary residential line as the primary line of a residence, of a household,[18] of a subscriber, or on some other basis.[19] Under a residence definition, only one line per service location—such as a house or an apartment—would receive primary line status. Under a household definition, each family unit would receive one primary line, so that if multiple families live in one house, each family would receive one line at rates with the lower caps. Under a subscriber definition, one line would be given primary-line status for each account opened with the carrier.

12. In the meantime, each price cap LEC devised its own definition for the purpose of its 1998 access tariff filings.[20] The Commission concluded in its investigation of those tariff filings that, pending completion of this rulemaking proceeding, defining as a primary line either one line per residence or one line per billing-name account per residence was "not unreasonable" for purposes of the tariff filings.[21] The Commission also found that reasonable definitions of primary and non-primary residential lines should, at a minimum, "categorize a second residential line as non-primary if the line is billed to the same name at the same location."[22]

13. In the *Notice*, the Commission tentatively concluded that price cap LEC records may be inadequate to identify primary residential lines, particularly if the Commission adopted a

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17 *Notice*, 12 FCC Rcd at 13648. Appendix A lists the fourteen parties that filed comments and the twelve parties that filed replies, as well as the shortened forms by which we will refer to these parties in this order.

18 The Commission suggested two possible definitions of household: one from the Census Bureau based on the identification of "separate living quarters," and one from the IRS based on the identification of the "principle place of abode" of a taxpayer and certain of the taxpayer's family members or other dependents. *See id.* at 13651-52 & nn. 26-27.

19 *Id.* at 13561.

20 *See Implementing Access Charge Reform*, Memorandum Opinion and Order, 13 FCC Rcd 14683, 14699-700 (1998) (*1998 Access Tariff Order*).

21 *Id.* at 14700-01.

22 *Id.* at 14701-02.

household-based definition.[23] Based on the presumption that identifying primary residential lines without information from the customer would be more administratively burdensome, the Commission tentatively concluded to permit price cap LECs to use end-user self-certification to identify primary lines.[24]

2. *Discussion*

14. Some commenters have supported each of the definitions of primary residential line that the Commission identified in the *Notice*: household-based,[25] account-based,[26] and location-based.[27] None of these definitions is flawless. An account-based definition, for example, would permit a subscriber to have multiple primary lines by ordering each line under a different account name. A location-based definition does not permit subscribers who share the same address, such as housemates, each to have his or her own primary line. A household-based definition would present carriers, consumers, and the Commission with the ambiguous and administratively burdensome task of determining which subscribers are part of which households. We have balanced the advantages and disadvantages of each option. We conclude that a location-based definition is the least intrusive and most administratively feasible definition that fulfills the *Access Charge Reform Order*'s objectives for setting higher SLC and PICC caps for non-primary residential lines and multi-line business lines.

15. Thus, we will consider one residential line provided by a price cap LEC per service location to be a primary residential line. For example, only one line per house, per apartment, or per college dorm room will receive primary-line rates. We begin by noting along with a number of commenters that LECs can implement this definition based on their service records.[28] As the Commission stated in the *Notice*, a location-based definition is "administratively simple and less invasive of subscribers' privacy because it does not require the gathering of information regarding

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[23] *See Notice*, 12 FCC Rcd at 13652-53 & n.29.

[24] *Id.* at 13653.

[25] *See* Calif. Public Utils. Comm'n Comments at 2-4 & n.1 (offering Census-like definition of "household").

[26] *See* AT&T Reply at 1-3, 5 n.6 (preferring, first, that the Commission eliminate the distinction between primary and non-primary lines, second, that the Commission adopt a "first line to the location" approach, and third, that the Commission adopt an account-based approach); Bell Atlantic Comments at 2; BellSouth Comments at i, 6-7; GTE Comments at 12, 14 (deferring to any prior state definition); MCI Comments at 2; RTC Comments at 4; SBC Comments at 3; Sprint Comments at 1-5 (preferring that the Commission eliminate the distinction between primary and non-primary lines); USTA Comments at 5-6; Welch Comments at § II.

[27] *See* Ameritech Comments at 4, 5, 7 (advocating a "first line at location" approach); AT&T Reply at 1-3 (advocating a "first line at location" approach but preferring that the Commission eliminate the distinction between primary and non-primary line); U S WEST Comments at 3.

[28] *See* Ameritech Comments at 4, 6, 7, 8; AT&T Reply at 3-4; U S WEST Comments at 3-4, 8.

subscriber living arrangements that would be needed to identify households."[29] Consequently, this definition obviates the need for the self-certification procedure that the Commission outlined in the *Notice*,[30] a procedure that the Office of Management and Budget (OMB) argues would be ineffective and burdensome.[31] A customer's service location is also straightforward to determine and not something the customer can easily alter or misreport to obtain the primary-line rate.[32] This definition will require carriers to cross-check records within a service location to ensure that only one subscriber line per residence receives the primary-line rates, but sorting records by service location should be relatively easy.[33] Furthermore, many price cap LECs are already moving toward a location-based definition in their tariffs.[34]

16. A number of commenters oppose this definition because it allows only one primary line per multi-subscriber residence.[35] If, for example, two roommates each subscribe to a line, only one line will be billed at the primary-line rate. The Commission recognized this fact in the *Notice*.[36] Generally, however, only a single residential connection is necessary to permit all residents at a particular service location complete access to telecommunications and information services, including access to emergency services.[37]

17. If a subscriber has both a primary and secondary home, this definition would also treat

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29 *Notice*, 12 FCC Rcd at 13651. *Accord* Ameritech Comments at 4-7; AT&T Reply at 3-4; U S WEST Comments at 4-5, 8.

30 *Accord* Ameritech Comments at 4-7; AT&T Reply at 3-4.

31 E-mail from Timothy R. Fain, Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, to Shoko Hair, FCC (Dec. 10, 1997) (OMB Comments) (conveying to the Commission OMB's decision contained in OMB comment file 3060-0792 to disapprove under the Paperwork Reduction Act of 1995 the end-user self-certification proposal).

32 *Cf.* Ameritech Comments at 5-6; AT&T Reply at 3-4; U S WEST Comments at 5.

33 *See* Ameritech Comments at 4-6 (stating that a location-based definition can be easily implemented by referring to information already in customer records); AT&T Reply at 3; U S WEST Comments at 8.

34 *See, e.g.*, Southwestern Bell Telephone Company Amendment to Application No. 459 (Oct. 15, 1998) (stating Southwestern Bell intention to adopt a location-based definition of primary and non-primary line).

35 *See* GTE Comments at 12; RTC Comments at 6; SBC Comments at 12; Sprint Reply at 3-4.

36 *Notice*, 12 FCC Rcd at 13651.

37 *See Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, 132 (Federal-State Joint Board 1996) (Joint Board Decision). For one notable exception regarding individuals with hearing or speaking disabilities, see the Further Notice of Proposed Rulemaking, Part III, *infra*.

one line in each home as primary.[38] We note that this definition departs from current practice in the business context, under which a business with one line in each of multiple locations in the same telephone company area receives multi-line business rates on each line.[39] We find it unnecessary to extend this policy to the residential context. As many commenters point out, the burden of investigating whether a particular residential subscriber has lines in multiple residences outweighs any benefit from collecting the higher non-primary line rates,[40] especially as the number of subscribers with multiple residences, and thus the number of lines that would be reclassified from primary to non-primary, is likely only a small percentage of all residential lines. Furthermore, in many instances different incumbent LECs will serve the primary and secondary residences.[41] This further complicates the task of determining which subscribers have multiple residences, and raises the difficult question of which line would be deemed the primary line, assuming the subscriber could have only one primary line throughout all his or her residences. We also note that the number of residential subscribers is larger than the number of business subscribers.

18. We will look at all lines provided by a particular price cap LEC, whether sold by the price cap LEC or a reseller, when determining the status of the lines to a residence.[42] We do so for the same reason the Commission decided in the *Access Charge Reform Order* to allow price cap LECs to charge the higher SLC to carriers that sell non-primary lines by reselling the incumbent LECs' lines: to address concerns that charging higher rates for non-primary residential lines sold by price cap LECs might encourage subscribers to obtain their additional lines from resellers for no reason other than to avoid the higher SLC.[43] Consequently, we do not accept the invitation of some commenters to qualify our definition further by treating as primary one line per location *per service provider*.[44] Doing so would create an artificial incentive for subscribers to spread their lines out among price cap LECs and multiple resellers merely to avoid the higher SLCs and PICCs associated with non-primary residential lines.[45]

19. We do not seek to discourage subscribers from ordering services from multiple

[38] *See* Bell Atlantic Comments at 4 (making this observation in the context of its recommended definition of one primary residential line per account per location).

[39] *See MTS and WATS Market Structure Phase I*, CC Docket No. 78-72, Memorandum Opinion and Order, 1985 FCC LEXIS 2456 (Common Carrier Bureau rel. Oct. 10, 1985).

[40] *See* Bell Atlantic Comments at 4; USTA Comments at 6.

[41] *See* Bell Atlantic Comments at 4.

[42] *Cf.* 47 C.F.R. § 69.152(e)(3) (stating that a LEC may collect the non-primary residential SLC from a carrier that resells the LEC's line to a residence that already receives a primary residential line).

[43] *See Access Charge Reform Order*, 12 FCC Rcd at 16017.

[44] *See* BellSouth Comments at i; MCI Comments at 5 & n.6; SBC Comments at 3-4.

[45] *See* USTA Comments at 4-5.

providers, but also do not want to create an artificial incentive for them to do so. Thus, when a price cap LEC has already sold a line to a residence, the price cap LEC may assess the higher rates on any additional resold lines. If, however, a resold price cap LEC line is the primary line, as is the case when all the lines to the residence are purchased from one or more resellers, the resold line will remain the primary line should a price cap LEC subsequently sell an additional line to that residence. If the price cap LEC line and resold line are sold simultaneously, the price cap LEC line shall be the primary line. When lines are sold to a location by both a price cap LEC and at least one reseller of price cap LEC lines, one of the lines must be identified as primary, but which one will have little impact on the end user: whichever line is deemed primary, the sum of the SLC and PICC charges to the consumer will be the same. Because the price cap LEC is physically providing both lines, we think it reasonable that it get the primary line designation in the rare circumstance that both lines are sold simultaneously.

20. Lines sold by wireless carriers and competitive LECs that do not resell price cap LEC lines shall not be considered in determining residential line status. Such carriers are not rate regulated by the Commission and are not subject to the Commission's rules regarding SLCs and PICCs.[46] Nor do price cap LECs collect SLCs or PICCs on those carriers' lines. This approach is equitable as between price cap LECs, resellers, competitive LECs, and wireless carriers because it does not provide any artificial advantage in marketing second lines. Furthermore, a price cap LEC would have difficulty determining whether its customers are also receiving lines from non-reselling competitive LECs or wireless carriers.

21. We will not adopt a household-based definition of primary residential line. The California Public Utilities Commission was the only party to support such a definition.[47] The California Public Utilities Commission is correct that such a definition would allow multiple primary lines in multi-household residences (*e.g.*, one for each family in a multi-family dwelling).[48] Such a definition would also, however, require gathering invasive information concerning living arrangements through a self-certification mechanism that would be administratively burdensome given the large universe of customers.[49] The ambiguity of a household-based definition may also result in inconsistent application across subscribers, or encourage subscribers simply to declare themselves part of different households to receive the lower primary-line rates.

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[46] *See Access Charge Reform Order*, 12 FCC Rcd at 16153 (finding it unnecessary to apply any of the Commission's Part 69 rules to competitive LECs); *Notice*, 12 FCC Rcd at 13649-50.

[47] Calif. Public Utils. Comm'n Comments at 2-4.

[48] *See id.* at 3.

[49] *See Notice*, 12 FCC Rcd at 13651. *Accord* OMB Comments; GTE Comments at 10-12; RTC Comments at 7-8. *Cf.* AT&T Reply at 3 (arguing that a location-based definition would avoid the need to determine whether multiple households live in one residence); Bell Atlantic Comments at 3 (arguing that defining one line per account per location as primary would avoid the need for self-certification); USTA Comments at 7 (arguing that an account-based definition does not require customers to relate information concerning their living arrangements); Welch Comments at § II.

22. Nor will we treat one line per subscriber account as primary.[50] Such a definition would allow multiple subscribers at a single location to receive the lower primary-line rates on each line (*e.g.*, roommates with individual accounts). Some commenters view this as an advantage to the definition.[51] Any such advantage, however, is offset by the ability of a subscriber to game such a definition by obtaining multiple lines under different account names.[52] Some carriers even allow customers to obtain separate accounts under the same name.[53] Furthermore, universal service objectives are met so long as residents at a single location have access to one line at that location at the subsidized primary-line rates; allowing more than one such line per location excessively shifts costs onto other subscribers. We agree with commenters that an account-based definition is unambiguous[54] and compatible with most carriers' existing service records,[55] but so too is a location-based definition. An account-based definition would eliminate the need to check whether multiple subscribers are receiving lines at the same location,[56] but the definition's other shortcomings outweigh this benefit. In any event, as noted above, sorting records by service location should not be difficult.

23. We also do not adopt the suggestion of some commenters that we eliminate the primary/non-primary line distinction, perhaps by applying an averaged rate to all lines or replacing the PICC with a cost-based SLC.[57] The Commission specifically decided in the *Access Charge Reform* and *Universal Service* orders not to raise the SLC caps on primary residential lines, in accordance with the recommendations of the Joint Board.[58] Furthermore, a narrow proceeding such as this is not the appropriate forum for considering a SLC increase.

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[50] *See* Bell Atlantic Comments at 2; BellSouth Comments at i, 6-7; GTE Comments at 12, 14 (deferring to any prior state definition); MCI Comments at 2; RTC Comments at 4; SBC Comments at 3; Sprint Comments at 4-5; USTA Comments at 5-6; Welch Comments at § II.

[51] *See* Bell Atlantic Reply at 2; BellSouth Comments at 6-7; GTE Comments at 12; MCI Comments at 2-3; USTA Comments at 7.

[52] *See* Ameritech Reply at 3-4; AT&T Reply at 5 n.6; U S WEST Comments at 4.

[53] *See 1998 Access Tariff Order*, 13 FCC Rcd at 14697-98, 14700, 14701-02 (describing Pacific Bell's practice of allowing a customer at a particular location to subscribe to multiple lines in separate accounts under the same name).

[54] *See* Bell Atlantic Comments at 3; Sprint Reply at 3; USTA Comments at 7; Welch Comments at § II.

[55] *See* Bell Atlantic Comments at 2-3, 6; BellSouth Comments at i-ii, 8, 11; MCI Comments at 2-3; SBC Comments at 4; USTA Comments at 6.

[56] *See* Sprint Comments at ii.

[57] AT&T Reply at 1-2 & n.2; GTE Reply at iii; N.Y. Telecommunications Ass'n Comments at 1-4; Sprint Comments at 1-3.

[58] *See Access Charge Reform Order*, 12 FCC Rcd at 15999, 16004, 16008-11; *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9167 (1997) (Universal Service Order).

24. Nor do we find attractive GTE's suggestion that we apply in each state any state's definition of primary residential line that predates the federal definition.[59] Although GTE argues that doing so would avoid confusing customers who are familiar with an existing definition,[60] we think it just as likely that the resulting lack of uniformity would confuse customers.[61] Using multiple definitions would also be administratively burdensome on LECs and IXCs alike.[62]

C. Definition of Single Line Business Line

1. Background

25. The Commission's rules for price cap LECs state that "[a] line shall be deemed to be a single line business subscriber line if the subscriber pays a rate that is not described as a residential rate in the local exchange service tariff and does not obtain more than one such line from a particular telephone company."[63] The Commission defines "telephone company" for the purposes of the Part 69 Rules as "an incumbent local exchange carrier."[64] The Commission sought comment in the *Notice* on whether to retain the definition of "single line business line,"[65] and whether to consider as a single line business a business with a single line in each of multiple locations.[66]

2. Discussion

26. We agree with the commenters that suggest we retain the existing definition of single line business line,[67] set out above. As the Commission observed in the *Notice*, this definition allows incumbent LECs to assess the correct SLCs and PICCs on business lines without determining whether

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[59] GTE Comments at 14-15.

[60] *Id.*

[61] *See* MCI Reply at 3-4.

[62] *Id.*

[63] 47 C.F.R. § 69.152(i). *Compare* 47 C.F.R. § 69.104(h) (providing identical definition for rate-of-return LECs).

[64] *See* 47 C.F.R. § 69.2(hh) (defining "Telephone Company"); *Access Charge Reform Order*, 12 FCC Rcd at 16153.

[65] *Notice*, 12 FCC Rcd at 13648, 13650-51.

[66] *Id.* at 13651.

[67] *See* Bell Atlantic Reply at 3; BellSouth Comments at 3-5; RTC Comments at 4; SBC Comments at 2 (preferring that the Commission eliminate the SLC distinction between single and multi-line business); Sprint Comments at 3; U S WEST Comments at 6.

a customer receives service from other carriers.[68]

27. This definition treats as a single line business any business that obtains one line from a price cap LEC[69] and other lines from a wireless carrier or a competitive LEC that does not resell the price cap LEC's lines.[70] As in the context of residential lines, we do not include lines provided by wireless carriers and competitive LECs that do not resell price cap LEC lines because such carriers are not subject to the Commission's SLC and PICC requirements, and because price-cap LECs do not collect SLCs or PICCs on those carriers' lines.[71]

28. As some commenters request, we clarify that if a business receives lines from a price cap LEC and a competitive LEC that is reselling the price cap LEC's lines, all those lines shall be considered multi-line business lines.[72] As USTA points out, clarifying that all the lines provided by a price cap LEC become multi-line business lines once a customer purchases a second line provided by that price cap LEC (whether sold by the price cap LEC or a reseller of the price cap LEC's lines) prevents businesses from avoiding the higher multi-line business charges by spreading out their lines among one price cap LEC and multiple resellers of the price cap LEC's lines.[73]

29. Sprint asks that we treat a business with one line in each of multiple locations as a multi-line business.[74] Under existing practice, a business with one line in each of multiple locations within a "telephone company area" is treated as a multi-line business.[75] We will continue that practice. Thus when a business subscriber's account reflects a single line in each of two locations

[68] *Notice*, 12 FCC Rcd at 13650-51.

[69] The definition of single line business line that applies to rate-of-return LECs is identical to the one that applies to price cap LECs. *See* 47 C.F.R. § 104(h). The Commission will address any possible changes to the definition for rate-of-return LECs in a separate rulemaking proceeding. *See supra* ¶ 3. If necessary, the Commission can address the issue in the context of a tariff investigation before completion of that rulemaking proceeding.

[70] *See Notice*, 12 FCC Rcd at 13651.

[71] *See supra* ¶ 20.

[72] *See* Ameritech Comments at 3; AT&T Reply at 1, 5-6 (agreeing with suggestion of treating a business as a multi-line business if it subscribes to lines from both a price cap LEC and a reseller of the price cap LEC's lines, so long as doing so does not require cumbersome exchanges of information between the reseller and the incumbent); USTA Comments at 4-5.

[73] *See* USTA Comments at 4-5. Again, we intend for individual customers to look at market forces, not regulatory definitions, when deciding whether to order their lines from a single carrier or from several carriers. *See supra* ¶ 18.

[74] Sprint Comments at 3.

[75] *See MTS and WATS Market Structure Phase I*, CC Docket No. 78-72, Memorandum Opinion and Order, 1985 FCC LEXIS 2456 (Common Carrier Bureau rel. Oct. 10, 1985).

within a particular telephone company area, the subscriber will be treated as a multi-line business. Consequently, we shall maintain the existing definition of single line business line, thereby preserving the status quo both for price cap LECs and rate-of-return LECs.

D. Identification of Primary Residential and Single Line Business Lines

1. Background

30. As discussed above, the Commission tentatively concluded in the *Notice* to permit price cap LECs to use end-user self-certification to identify primary lines.[76] The Commission also sought comment on whether to require resellers to relay primary- and non-primary-line data to price cap LECs, or whether price cap LECs should identify the primary and non-primary lines of resellers' customers directly.[77] Thus, if resellers collected self-certifications, the Commission asked whether resellers should be required to provide those certifications to price cap LECs so that the price cap LECs could assess on the resellers the appropriate SLCs.[78] The Commission tentatively concluded that it would not use databases,[79] county and municipal records,[80] or social security numbers[81] to identify primary lines because such proposals are administratively burdensome and raise privacy concerns.

2. Discussion

31. The definitions of primary residential line and single line business line will enable price cap LECs to use their service records to identify the status of their lines.[82] This approach alleviates the concerns that the Commission expressed in the *Notice* that carrier records would be insufficient to identify line-status, as those concerns were directed primarily at a household-based

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76 *See supra* ¶ 13.

77 *See Notice*, 12 FCC Rcd at 13654.

78 *Id.*

79 *See id.* at 13655-56 (stating that the administrative burdens for a carrier or the Commission to maintain such databases might outweigh any accuracy gains they provide). *Accord* Ameritech Comments at 7; Bell Atlantic Comments at 4; BellSouth Comments at 9; GTE Comments at 23-24; RTC Comments at 9; U S WEST Comments at 8-9; USTA Comments at 9; Welch Comments at § IV.

80 *See Notice*, 12 FCC Rcd at 13656 (stating that county and municipal records would be burdensome to use because they are dispersed throughout the country in a variety of formats and are designed for deed and tax purposes rather than for identifying primary lines). *Accord* Ameritech Comments at 7; U S WEST Comments at 9 n.15.

81 *See Notice*, 12 FCC Rcd at 13656 & n.43 (noting that carriers do not track social security numbers, and stating that use of social security numbers would raise privacy issues). *Accord* Welch Comments at § IV.

82 *See* Ameritech Comments at 4, 6, 7; U S WEST Comments at 7-8.

definition of primary residential line.[83] Carriers will have the necessary information in their existing service records; thus, allowing carriers to use their records is the least burdensome option for carriers, consumers, and the Commission, and minimizes privacy concerns.[84] Carrier records are also relatively easy to verify and reasonably immune from gaming or misreporting by customers, willful or otherwise.[85]

32. Consequently, we need not address various administrative and privacy issues related to the self-certification method discussed in the *Notice*.[86] Price cap carriers are, of course, still subject to tariffing requirements,[87] and the Commission can always examine carriers' line counts in a tariff investigation.[88] We note, also, that carriers are governed by statutory and regulatory restraints regarding the treatment of customer information to the extent that they apply to data regarding line status.[89]

33. We will require each price cap LEC to identify the status of the lines it provides to resellers. We are not persuaded by commenters' arguments that requiring price cap LECs to determine the status of other carriers' lines will raise administrative and confidentiality concerns.[90] Most of these comments focused on the difficulties of identifying lines provided by facilities-based competitive LECs, not resellers of price cap LECs' lines,[91] or presumed a self-certification procedure.[92] Bell Atlantic mentioned late in the proceeding that it cannot "readily identify" non-primary lines for carriers that resell Bell Atlantic service because it is unable at the present time to coordinate its retail

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83 *See Notice*, 12 FCC Rcd at 13652-53 & n.29.

84 *See* Bell Atlantic Reply at 4-5; BellSouth Comments at 9-10; Sprint Comments at 8-9.

85 *See* Ameritech Comments at 5-6; AT&T Reply at 3-4; BellSouth Reply at 2-3; SBC Comments at 4, 8-9; U S WEST Comments at 4-5; USTA Comments at 8, 10.

86 *See Notice*, 12 FCC Rcd at 13648, 13653-54, 13656-60.

87 *See* 47 U.S.C. § 203.

88 *See* 47 U.S.C. §§ 204, 205. *Cf.* Bell Atlantic Comments at 5.

89 *See, e.g.*, 47 U.S.C. § 222; *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information*, CC Docket No. 96-115, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998).

90 *See* BellSouth Comments at 8-9; Calif. Public Utils. Comm'n Comments at 6-7; GTE Comments at 19; MCI Comments at 5-6; USTA Comments at 9.

91 *See* BellSouth Comments at 5; GTE Comments at 3.

92 *See* Bell Atlantic Comments at 6-7 & n.10; Calif. Public Utils. Comm'n Comments at 6-7; GTE Comments at 19; MCI Comments at 5-6; USTA Comments at 9.

and wholesale records.[93] We believe, however, that the price cap LECs are in a better position going forward than the resellers to know all their lines going to a particular residence, as their service records indicate both the lines the price cap LECs bill and the lines they provide on behalf of resellers.[94] Thus, we do not adopt the proposal of some commenters that we require resellers to identify their primary and non-primary lines to price cap LECs.[95] The issues the Commission raised in the *Notice* regarding the exchange of information between price cap LECs and resellers are largely mooted by our decision to adopt a location-based definition of primary line and to allow carriers to use service records rather than self-certification to identify line status. Because of that decision, as well as our clarification of the single line business line definition, price cap LECs will have the information necessary to administer the definitions, eliminating the need to share data with, or collect data from, other carriers.

E. Customer Notification

34. Because the distinction between primary and non-primary residential lines may cause customer confusion, the Commission sought comment in the *Notice* on whether to require carriers to provide consumers with a uniform disclosure statement describing the distinction.[96] The Commission tentatively concluded that such a disclosure requirement would be consistent with applicable First Amendment standards, and sought comment on that conclusion.[97] The Commission also sought comment on how, if it adopts a consumer disclosure statement that refers to the SLC cap on non-primary lines, such disclosure statement should indicate any future increases in the SLC cap.[98] The Commission sought comment on whether such a statement would be compatible with marketing and consumer information campaigns that carriers have instituted or may be formulating.[99] The Commission has issued a Notice of Proposed Rulemaking in CC Docket No. 98-170 focused on truth-in-billing.[100] We think it more appropriate to consider these issues in connection with that docket. Consequently, we refer these issues to that proceeding.

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[93] *See* Letter from Joseph Mulieri, Director of Government Relations—FCC, Bell Atlantic, to Jane Jackson, Chief, Competitive Pricing Division, FCC (Jan. 20, 1999).

[94] *See* Ameritech Comments at 7; U S WEST Comments at 8.

[95] *See* Bell Atlantic Comments at 7 n.10; GTE Comments at 19-20; MCI Comments at 4-6; RTC Comments at 9; SBC Comments at 5-6; Sprint Comments at iii; USTA Comments at 9.

[96] *Notice*, 12 FCC Rcd at 13660.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Truth-in-Billing*, CC Docket No. 98-170, Notice of Proposed Rulemaking, FCC 98-232 (rel. Sept. 17, 1998).

F. Detailed PICC Billing of IXCs

35. AT&T, MCI, and Sprint have asked the Commission to require price cap LECs to issue detailed bills that enable interexchange carriers to audit the PICC charges that price cap LECs assess on them.[101] Creating additional requirements is not necessary at this time. We already require price cap LECs to provide interexchange carriers with customer-specific information about the PICCs they assess on them,[102] and to include a "class of customer" indicator on Customer Account Record Exchange (CARE) transactions for new customer notifications.[103] Furthermore, our decisions in this order concerning the definition and identification of primary residential lines and single line business lines should facilitate clearer and more uniform billing of SLCs and PICCs.

G. Procedural Matters

1. *Final Regulatory Flexibility Analysis*

36. As required by the Regulatory Flexibility Act (RFA),[104] the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) in the *Notice* in this docket.[105] The Commission sought written public comment on the proposals in the *Notice*, including comment on the *IRFA*. The RFA also requires the Commission to prepare a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact this order might have on small entities, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[106]

37. The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[107] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its

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[101] AT&T Reply at 4 n.5; MCI Comments at 9-10; Sprint Comments at 9-10.

[102] *See Access Charge Reform*, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606, 16610 (1997).

[103] *See MCI Emergency Petition for Prescription*, Memorandum Opinion and Order, 13 FCC Rcd 11127, 11127 (Common Carrier Bur. 1998).

[104] *See* 5 U.S.C. § 603. The Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA), amended the RFA. Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[105] *See Notice*, 12 FCC Rcd at 13661-66.

[106] 5 U.S.C. § 605(b).

[107] 5 U.S.C. § 601(6).

activities.[108] A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[109] The SBA has further defined a small business for SIC categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) as a business with no more than 1,500 employees.[110] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[111] "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."[112]

38. Only price cap LECs currently assess SLCs and PICCs, and this order places the responsibility for differentiating and identifying primary residential lines and single line business lines only on price cap LECs, as discussed above. Consequently, this order will not significantly affect "small organizations" or "small governmental jurisdictions," and we only address the impact on small price cap LECs. Neither the Commission nor SBA has developed a definition of "small entity" specifically applicable to price-cap LECs. The closest definition under SBA rules is that for establishments providing "Telephone Communications, Except Radiotelephone."

39. According to our most recent data, 1,371 carriers reported that they were engaged in the provision of local exchange services.[113] Fewer than 20 of these carriers are price-cap incumbent LECs. Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of "small entity."[114] We consider these carriers dominant in their field of operations. Some also are not independently owned and operated, and most if not all likely have more than 1,500 employees. We therefore certify that this *Report and Order* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of this order, including this certification, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[115] A summary of this *Report and Order* and this

108 5 U.S.C. § 601(3).

109 Small Business Act, 15 U.S.C. § 632.

110 13 C.F.R. § 121.201.

111 5 U.S.C. § 601(4).

112 5 U.S.C. § 601(5).

113 FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997) (Telecommunications Industry Revenue).

114 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16144-45, 16150 (1996).

115 *See* 5 U.S.C. § 801 (a)(1)(A).

certification will also be published in the Federal Register,[116] and will be sent to the Chief Counsel for Advocacy of the SBA.

2. *Final Paperwork Reduction Act Analysis*

40. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104-13, and does not contain new and/or modified information collections subject to OMB review.

III. Further Notice of Proposed Rulemaking

A. Discussion

41. In establishing different SLCs and PICCs for primary and non-primary residential lines, we cited the important universal service goal of subsidizing rates for at least one line so that consumers have access to the telephone network.[117] Since the Notice on the definition of primary line, however, it has come to our attention that when one or more members of a residence have hearing or speech disabilities, the members of the residence often subscribe to one line dedicated for a traditional telephone and one line for a text telephone (TTY).[118] The residents can use the TTY to communicate directly with other TTYs, or can use the TTY in conjunction with Telecommunications Relay Services (TRS)[119] and "two-line" voice or hearing carryover.[120] Thus, for example, in residences where one family member has a hearing or speech disability, two lines may be necessary for all the residents to have access to telephone service.

42. We believe that it is important to ensure that consumers with hearing or speech

[116] *See* 5 U.S.C. § 604(b).

[117] *See, e.g., Access Reform Order*, at 15999-13.

[118] A TTY uses graphic communication in the transmission of coded signals through a wire or radio communication system. 47 C.F.R. § 64.601(8).

[119] Telecommunications Relay Services (TRS) are telephone transmission services that enable an individual who has a hearing or speech disability to communicate by wire or radio with a hearing individual in a manner that is functionally equivalent to the way an individual who does not have a hearing or speech disability communicates using voice telephone services by wire or radio. 47 C.F.R. § 64.601(7). The Commission's rules for TRS are codified at 47 C.F.R. §§ 64.601 - 64.605.

[120] Voice carryover (VCO) is a form of TRS that allows users with hearing disabilities to speak directly to a hearing person, while the TRS communication assistant (CA) types what is said to the TTY user. Hearing carryover (HCO) is a form of TRS that allows persons with speech disabilities to listen to the person they are calling, while typing their statements for the CA to read aloud to the voice telephone user. See 47 C.F.R. § 64.601(6), (9). "Two line" VCO and HCO are versions of these services that use two telephone lines and conference calling functions to increase the transparency of the CA and improve the functional equivalency of these services.

disabilities have access to the telephone network at primary-line rates, but we lack a detailed record in the present proceeding to determine how to address this issue. We tentatively conclude in this Further Notice of Proposed Rulemaking that individuals with speech or hearing disabilities served by price cap LEC lines should have access to the telecommunications network at primary line rates. Moreover, if we extend the non-primary line rate structure to rate-of-return LECs, as we proposed in the rate-of-return access reform notice,[121] we tentatively conclude that individuals with hearing or speech disabilities served by rate-of-return LEC lines should receive similar treatment. We seek comment on these tentative conclusions. In addition, we seek comment on other technologies or services that require an additional line to permit consumers with disabilities to access the telephone network and on whether those additional lines should also receive primary line rates. We believe that our tentative conclusions above are consistent with the Commission's mandate to ensure that all Americans have access to telecommunications services,[122] and with the policy goals underlying the Commission's decision to cap primary residential SLCs and PICCs at lower levels than are applicable to other lines.

43. One way to ensure that consumers with hearing or speech disabilities have access to the telephone network at primary-line rates would be to treat as primary one residential line per location that is used by such individuals in conjunction with a TTY, regardless of whether another line at the location is also treated as primary for residents without such disabilities. We seek comment on such an approach, and how it might be implemented.

44. Another approach would be to subsidize more explicitly the difference in charges that would apply when the TTY-dedicated line is deemed non-primary as opposed to primary. We seek comment on such an approach, and how it might be implemented. In particular, we seek comment on whether the subsidies for such an approach should come from the TRS Fund or the more general Universal Service Fund. We also seek comment on the implications of section 225(d)(1)(D), which "require[s] that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination."[123]

45. In many cases, the only change necessary to make a telephone line more easily accessible to an individual with a disability is to add a piece of consumer premises equipment (CPE), such as a TTY. Consequently, carriers may have no readily apparent means of determining which lines are being used by individuals with disabilities. We seek comment on whether carrier records indicate the presence at a location of certain CPE such as TTYs. We also seek comment on whether self-certification would be an appropriate means for carriers to identify the relatively small universe of

[121] *See Access Charge Reform for Incumbent LECs Subject to Rate-of-Return Regulation*, Notice of Proposed Rulemaking, 13 FCC Rcd 14238, 14251-53 (1998).

[122] *See* 47 U.S.C. § 151 (creating the Federal Communication Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States ... Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges").

[123] 47 U.S.C. § 225(d)(1)(D).

customers to which either the definitional or funding approaches would apply, and if so, how such self-certification could be implemented. We note that many IXCs offer qualified TTY users the opportunity to self-certify to receive toll discounts, in recognition of the longer calling times associated with TTY use. For the sake of a clear record and so that all parties understand the issues involved, we also ask commenters to describe the developments in technology and services associated with TTYs, TRS, and "two-line" voice or hearing carryover. Parties should also address the extent to which any of these proposals would affect small business entities, including new entrants.

B. Procedural Matters

1. Ex Parte

46. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's revised *ex parte* rules, which became effective June 2, 1997.[124] Parties making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 C.F.R. § 1.1206(b)(2), as revised. Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b), as well.

2. Initial Regulatory Flexibility Act Analysis

47. As required by the RFA, the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities[125] by the policies and rules proposed in this *Further Notice of Proposed Rulemaking*. Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of the *Further Notice*, but they must have a separate and distinct heading, designating the comments as responses to the IRFA. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[126] In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[127]

48. Need for and Objectives of the Proposed Rules: In the *Access Reform Order*, the Commission set lower SLC and PICC caps for primary residential lines and single line business lines than for non-primary residential lines and multi-line business lines. The *Report and Order* in this

[124] *See Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, GC Docket No. 95-21, Report and Order, 12 FCC Rcd 7348, 7356-57 (citing 47 C.F.R. § 1.1204(b)(1)).

[125] For discussion of the meaning of "small entity," see *supra* paragraph 37.

[126] *See* 5 U.S.C. § 603(a).

[127] *See id.*

proceeding promulgates definitions of "primary residential line" and "single line business line" to promote uniformity in the way price cap LECs assess SLCs and PICCs. The *Further Notice* seeks comment on how to apply the primary line distinction to TTY lines used by individuals with speech or hearing disabilities.

49. Legal Basis: The proposed action is authorized by sections 1, 2, 4(i), 4(j), 201-205, 218-220, 225, and 254 of the Communications Act as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, 218-220, 225, and 254.

50. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply: The RFA directs agencies to provide, where feasible, a description of the type and number of small entities that our proposed rules may affect.[128] The proposals set forth in this proceeding may have a significant economic impact on a substantial number of small entities identified by the SBA. Because one of the proposals is to use a funding mechanism, such as the Universal Service Fund, we provide estimates of the number of small entities potentially affected across many sectors of the telecommunications industry. A definitional approach, on the other hand, would affect only price cap LECs. Consequently, the rules we eventually adopt may affect significantly fewer small entities than we describe here.

51. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS).[129] According to data in the most recent report, there are 3,459 interstate carriers.[130] Below, we further describe and estimate the number of small entities that may be affected by the proposed rules, if adopted. We ask parties to comment on the number of small carriers that they believe will be affected by rules regarding the primary-line treatment of TTY lines used by individuals with speech or hearing disabilities. Wherever possible, commenters should break their estimates into categories and subcategories similar to those we discuss here.

52. *Telephone Companies (SIC 4813).* We shall continue to exclude small incumbent LECs from the definitions of "small entity" and "small business concern,"[131] but nonetheless consider the impact on small incumbent LECs in our IRFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass "small incumbent LECs." We use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."

[128] 5 U.S.C. § 603(b)(3).

[129] Telecommunications Industry Revenue, Figure 2.

[130] *Id.*

[131] For discussion of our reasons for excluding small incumbent LECs, see *supra* paragraph 39.

53. *Total Number of Telephone Companies Affected.* The proposals herein may have a significant effect on a substantial number of the small entity telephone companies identified by SBA. The U.S. Bureau of the Census reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services for at least one year.[132] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. Although it seems certain that some of the 3,497 telephone service firms are not "independently owned and operated," are dominant in their field, or have more than 1,500 employees, we will assume for present purposes that they qualify as small entities or small incumbent LECs. Thus, we estimate that the rules we eventually adopt following this *Further Notice* will affect no more than 3,497 small entity telephone companies and small incumbent LECs.

54. *Wireline Carriers and Service Providers.* SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that 2,321 such telephone companies were in operation for at least one year at the end of 1992.[133] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Because we lack more specific data, we will assume for present purposes that the 26 companies have fewer than 1,500 employees. Although it seems certain that some of the 2,321 carriers are not independently owned and operated, or are dominant in their field, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that the rules we eventually adopt will affect no more than 2,321 small entity wireline companies and small incumbent LECs.

55. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition of small LEC. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. According to our most recent data, 1,371 carriers reported that they were engaged in the provision of local exchange services.[134] Although it seems certain that some of these carriers are not independently owned and operated, are dominant in their field, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that the rules we eventually adopt following this *Further Notice* will affect no more than 1,371 small entity LECs and small incumbent LECs.

56. *Interexchange Carriers.* Neither the Commission nor SBA has developed a definition of small IXCs. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. According to the most recent

[132] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size,* at Firm Size 1-123 (1995) ("1992 Census").

[133] *Id.*, at Firm Size 1-123.

[134] *Telecommunications Industry Revenue*, Figure 2.

Telecommunications Industry Revenue data, 143 carriers reported that they were engaged in the provision of interexchange services.[135] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that the rules we eventually adopt following this *Further Notice* will affect no more than 143 small entity IXCs.

57. *Competitive Access Providers*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. According to the most recent *Telecommunications Industry Revenue* data, 109 carriers reported that they were engaged in the provision of competitive access services.[136] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that the rules we eventually adopt following this *Further Notice* will affect no more than 109 small entity CAPs.

58. *Operator Service Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. According to the most recent *Telecommunications Industry Revenue* data, 27 carriers reported that they were engaged in the provision of operator services.[137] Although some of these companies may not be independently owned and operated, or may have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that the rules we eventually adopt following this *Further Notice* will affect no more than 27 small entity operator service providers.

59. *Pay Telephone Operators*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[138] According to the most recent *Telecommunications Industry Revenue* data, 441 carriers reported that they were engaged in the provision of pay telephone services.[139] We do not have data specifying the number of these carriers that are not independently owned and operated or have

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] 13 C.F.R. § 121.201, SIC code 4813.

[139] *Telecommunications Industry Revenue*, Figure 2.

more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 441 small entity pay telephone operators that may be affected by the proposed rules, if adopted.

60. *Resellers (including debit card providers)*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company other than radiotelephone (wireless) companies. According to the most recent *Telecommunications Industry Revenue* data, 339 reported that they were engaged in the resale of telephone service.[140] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the proposed rules, if adopted.

61. *Radiotelephone* (Wireless) Carriers. The Census Bureau reports that there were 1,178 companies in operation for at least one year at the end of 1992 that meet the SBA's definition of radiotelephone company.[141] The Census Bureau also reported that all but 12 of those radiotelephone companies had fewer than 1,000 employees. Because we lack more specific data, we will assume for present purposes that the remaining 12 companies have fewer than 1,500 employees. Although it seems certain that some of the wireless carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that the rules we eventually adopt following this *Further Notice* will affect no more than 1,178 small entity radiotelephone companies.

62. *Cellular Licensees*. Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies, discussed above. We note that there are 1,758 cellular licenses, although a cellular licensee may own several licenses. According to the most recent *Telecommunications Industry Revenue* data, 804 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service (PCS) services, which are placed together in the data.[142] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 804 small cellular service carriers that may be affected by the proposed rules, if adopted.

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[140] *Id.*

[141] 1992 Census, at Firm Size 1-123.

[142] *Telecommunications Industry Revenue*, Figure 2.

63. *Mobile Service Carriers*. Neither the Commission nor the SBA has developed a definition of small entities applicable to mobile service carriers. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. The most recent *Telecommunications Industry Revenue* data shows that 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services.[143] Consequently, we estimate that there are fewer than 172 small mobile service carriers that may be affected by the proposed rules, if adopted.

64. *Paging Services*. The Commission has adopted a two-tier definition of small businesses in the context of auctioning licenses in the paging service. A small business is defined as either (1) a entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than $3 million; or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than $15 million. The SBA has approved this definition for paging companies. The Commission estimates that the total current number of paging carriers is approximately 600. In addition, the Commission anticipates that a total of 16,630 non-nationwide geographic area licenses will be granted or auctioned. The geographic area licenses will consist of 2,550 Major Trading Area (MTA) licenses and 14,080 Economic Area (EA) licenses. In addition to the 47 Rand McNally MTAs, the Commission is licensing Alaska as a separate MTA and adding three MTAs for the U.S. territories, for a total of 51 MTAs. No auctions of paging licenses have been held yet, and there is no basis to determine the number of licenses that will be awarded to small entities. Given the fact that no reliable estimate of the number of paging licensees can be made, we assume, for purposes of this IRFA, that all of the current licensees and the 16,630 geographic area paging licensees either are or will consist of small entities, as that term is defined by the SBA.

65. *Broadband PCS Licensees*. The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[144] For Block F, the Commission added a classification for "very small business," which the Commission defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[145] The SBA has approved these regulations defining "small entity" in the context of broadband PCS auctions.[146] We do not have sufficient data to determine how many small entities under the SBA-approved definition bid successfully for licenses in Blocks A and B. As of now there are 90

[143] *Id.*

[144] *See Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, FCC 96-278, WT Docket No. 96-59, paras. 57-60 (June 24, 1996) (PCS and CMRS Report and Order), 61 FR 33859 (July 1, 1996); *see also* 47 C.F.R. § 24.720(b).

[145] *PCS and CMRS Report and Order*, at para. 60.

[146] *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

non-defaulting winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders qualify as small entities for Blocks D, E, and F. Based on this information, we conclude that the rules we eventually adopt following this *Further Notice* will affect no more than 183 non-defaulting winning bidders that qualify as small entities in the C, D, E, and F Block broadband PCS auctions.

66. *Narrowband PCS*. The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded by auction. Such auctions have not yet been scheduled, however. Given that nearly all radiotelephone companies have no more than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for purposes of this IRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

67. *Rural Radiotelephone Service*. The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.[147] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).[148] We will use the SBA's definition applicable to radiotelephone companies. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

68. *Specialized Mobile Radio*. Pursuant to Section 90.814(b)(1) of the Commission's Rules,[149] the Commission has defined "small entity" for geographic area 800 MHz and 900 MHz SMR licenses as firms that had average gross revenues of no more than $15 million in the three previous calendar years. This regulation defining "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[150] We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service, nor how many of these providers have annual revenues of no more than $15 million. The Commission recently held auctions for geographic area licenses in the

147 The service is defined in Section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

148 BETRS is defined in Sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757, 22.759.

149 47 C.F.R. § 90.814(b)(1).

150 *See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463 (1995).

900 MHz SMR band. There were 60 winning bidders who qualified as small entities under the Commission's definition in the 900 MHz auction. Based on this information, we conclude that the rules we eventually adopt following this *Further Notice* will affect no more than 60 small entity geographic area SMR licensees. A total of 525 licenses were auctioned for the upper 200 channels in the 800 MHz geographic area SMR auction. There were 62 qualifying bidders, of which 52 were small businesses. The Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis to estimate, moreover, how many small entities within the SBA's definition will win these lower channel licenses. We assume that, for purposes of our evaluations in this IRFA, all of the current specialized mobile radio licensees are small entities, as that term is defined by the SBA.

69. *220 MHz Service*. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHZ Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to Radiotelephone Communications companies. According to the Bureau of the Census, only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[151] Therefore, if this general ratio continues to 1999 in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's definition.

70. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz *Third Report and Order* we adopted criteria for defining small businesses and very small businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[152] We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[153] The SBA has approved these definitions.[154] An auction of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[155] 908 licenses were auctioned in 3 different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693

[151] *1992 Census*, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC code 4812 (issued May 1995).

[152] 220 MHz Third Report and Order, 12 FCC Rcd 10943, 11068-70, at paras. 291- 295 (1997).

[153] *Id.* at 11068-69, para. 291.

[154] *See* Letter from A. Alvarez, Administrator, SBA, to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC (Jan. 6, 1998).

[155] *See generally* Public Notice, "220 MHz Service Auction Closes," Report No. WT 98-36 (Wireless Telecom. Bur. Oct. 23, 1998).

were sold. Companies claiming small business status won: one of the Nationwide licenses, 67% of the Regional licenses, and 54% of the EA licenses. As of January 22, 1999, the Commission announced that it was prepared to grant 654 of the Phase II licenses won at auction.[156] A re-auction of the remaining, unsold licenses is likely to take place during calendar year 1999.

71. *Mobile Satellite Services (MSS).* The Commission has not developed a definition of small entities applicable to licensees in the international services. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to Communications Services, Not Elsewhere Classified (NEC). This definition provides that a small entity is one with $11.0 million or less in annual receipts.[157] According to the Census Bureau, there were a total of 848 communications services, NEC, in operation in 1992, and a total of 775 had annual receipts of less than $9.999 million.[158] Mobile Satellite Services or Mobile Satellite Earth Stations are intended to be used while in motion or during halts at unspecified points. These stations operate as part of a network that includes a fixed hub or stations. The stations that are capable of transmitting while a platform is moving are included under Section 20.7(c) of the Commission's Rules[159] as mobile services within the meaning of Sections 3(27) and 332 of the Communications Act.[160] Those MSS services are treated as CMRS if they connect to the Public Switched Network (PSN) and also satisfy other criteria of Section 332. Facilities provided through a transportable platform that cannot move when the communications service is offered are excluded from Section 20.7(c).[161] The MSS networks may provide a variety of land, maritime and aeronautical voice and data services. There are eight mobile satellite licensees. At this time, we are unable to make a precise estimate of the number of small businesses that are mobile satellite earth station licensees.

72. *Air-Ground Radiotelephone Service.* The Commission has not adopted a definition of small business specific to the Air-Ground Radiotelephone Service, which is defined in Section 22.99 of the Commission's rules.[162] Accordingly, we will use the SBA's definition applicable to radiotelephone companies. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA definition.

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[156] Public Notice, "FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made," Report No. AUC-18-H, DA No. 99-229 (Wireless Telecom. Bur. Jan. 22, 1999).

[157] 13 C.F.R. § 120.121, SIC Code 4899.

[158] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D, SIC 4899 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

[159] 47 C.F.R. § 20.7(c).

[160] 47 U.S.C. §§ 153(27), 332.

[161] 47 C.F.R. § 20.7(c).

[162] 47 C.F.R. § 22.99.

73. *Fixed Microwave Services*. Microwave services include common carrier,[163] private-operational fixed,[164] and broadcast auxiliary radio services.[165] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will use the SBA's definition applicable to radiotelephone companies. We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies, and may be affected by the rules we eventually adopt to the extent that they contribute to the Universal Service or TRS funds.

74. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees affected includes these eight entities.

75. *Cable System Operators (SIC 4841)*. The SBA has developed a definition of small entities for cable and other pay television services that includes all such companies generating less than $11 million in revenue annually.[166] This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. According to the Census Bureau, there were 1,758 total cable and other pay television services and 1,423 had less than $11 million in revenue.[167] We note that cable system operators are included in our analysis due to their ability to provide telephony.

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[163] 47 U.S.C. § 201-276.

[164] Persons eligible under Parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[165] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[166] 13 C.F.R. § 121.201, SIC 4841.

[167] U.S. Department of Commerce, Bureau of Census, *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D, SIC 4841 (Bureau of the Census data under contract to the Office of Advocacy of the SBA).

76. The Commission has developed with the SBA's approval our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[168] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[169] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions and rules adopted in this Order. We conclude that only a small percentage of these entities currently provide qualifying "telecommunications services" required by the Act and, therefore, estimate that the number of such entities affected are significantly fewer than noted.

77. The Act also contains a definition of small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[170] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[171] Based on available data, we find that the number of cable operators serving 617,000 subscribers or fewer total 1,450.[172] We do not request nor do we collect information concerning whether cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000,[173] and thus are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Act.

78. *Direct Broadcast Satellites (DBS)*. Because DBS provides subscription services, DBS falls within the SBA definition of Cable and Other Pay Television Services (SIC 4841). As of December 1996, there were eight DBS licensees. The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that

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[168] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393.

[169] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[170] 47 U.S.C. § 543(m)(2).

[171] 47 C.F.R. § 76.1403(b).

[172] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[173] We receive such information on a case-by-case basis only if a cable operator appeals to a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.1403(b) of the Commission's rules. *See* 47 C.F.R. § 76.1403(d).

could be impacted by these rules. Although DBS service requires a great investment of capital for operation, we acknowledge that there are several new entrants in this field that may not yet have generated $11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

79. *International Services.* The Commission has not developed a definition of small entities applicable to licensees in the international services. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to Communications Services, Not Elsewhere Classified (NEC). This definition provides that a small entity is expressed as one with $11 million or less in annual receipts.[174] According to the Census Bureau, there were a total of 848 communications services, NEC in operation in 1992, and a total of 775 had annual receipts of less than $9,999 million.[175] We note that those entities providing only international service will not be affected by our rules. We do not, however, have sufficient data to estimate with greater detail those providing both international and interstate services. Consequently, we estimate that there are fewer than 775 small international service entities potentially impacted by our rules.

80. *International Broadcast Stations.* Commission records show that there are 20 international broadcast station licensees. We do not request nor collect annual revenue information, and thus are unable to estimate the number of international broadcast licensees that would constitute a small business under the SBA definition. We note that those entities providing only international service will not be affected by our rules. We do not, however, have sufficient data to estimate with greater detail those providing both international and interstate services. Consequently, we estimate that there are fewer than 20 international broadcast stations potentially impacted by our rules.

81. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements: Once we adopt rules regarding the primary-line treatment of TTY lines used by individuals with speech or hearing disabilities, carriers will need to identify such individuals. To do so, carriers may be able to rely on existing mechanisms, such as the toll discount program. If carriers are unable to use existing mechanisms, they may need to implement a self-certification mechanism. If the Commission adopts a funding approach, carriers may also need to report revenues for the administration of the funding mechanism. Carriers may, however, already be providing some of the necessary information in conjunction with existing funding mechanisms, such as the one currently in place for TRS. Under the funding approach, carriers may also need to provide data on the revenues attributable to TTY lines used by speech or hearing-impaired individuals as primary lines and as non-primary lines. We ask parties to comment on the reporting, recordkeeping, and other compliance requirements they believe will be necessary to implement rules regarding the primary-line treatment of TTY lines used by individuals with speech or hearing disabilities.

82. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered: We have outlined and sought comment on what we believe are

[174] 13 C.F.R. § 120.121, SIC 4899.

[175] United States Dept. of Commerce, Bureau of Census, *1992 Economic Census Industry and Enterprise Receipts Size Report*, at Tbl. 2D.

the significant possible alternatives for implementing a primary-line definition with respect to TTY lines used by speech- or hearing-disabled individuals. We note that small entities will be largely unaffected by the rules we promulgate following this *Further Notice* because the distinction between primary and non-primary lines applies only to price cap LECs. Depending on the funding mechanism—if any—chosen, however, some small entities may have contribution requirements. We seek comment on any significant alternative compliance or reporting requirements or timetables that take into account the resources available to small entities and accomplish our stated objectives.

83. Federal Rules that May Overlap, Duplicate, or Conflict with the Proposed Rules. Because this is the first occasion in which the Commission has attempted to define primary lines, we do not believe the proposals in this *Further Notice* overlap with or duplicate any existing federal rules. We ask parties to comment on any federal rules that they believe may overlap with, duplicate, or conflict with the approaches we discuss in this *Further Notice*.

3. *Initial Paperwork Reduction Act Analysis*

84. Certain proposals contained in this *Further Notice* may require an information collection. As part of our continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, we invite the general public and the OMB to take this opportunity to comment on those information collections.[176] Public and agency comments are due at the same time as other comments on this *Further Notice*; OMB comments are due 60 days from date of publication of this *Further Notice* in the Federal Register. Comments should address: (a) whether the proposed information collections are necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

4. *Notice and Comment Procedures*

85. Pursuant to sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before April 9, 1999, and reply comments on or before April 26, 1999. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[177]

86. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however,

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[176] A supporting statement, prepared in accordance with the Paperwork Reduction Act, that details the Commission's estimates with respect to the burdens imposed by the proposals in this FNPRM is available from the Commission or from the Office of Management and Budget.

[177] *See Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd 11322 (1998).

commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

87. Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street S.W., Room TW-A325, Washington, D.C. 20554. In addition, one copy of each pleading must be filed with the Commission's duplicating contractor, International Transcription Services (ITS), 1231 Twentieth Street, N.W., Washington, D.C. 20036, and one copy with the Chief, Competitive Pricing Division, 445 Twelfth St. S.W., Fifth Floor, Washington, D.C. 20554.

88. Parties are also asked to submit comments and reply comments on diskette. Such diskette submission would be in addition to and not a substitute for the formal filling requirements addressed above. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS Dos 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labeled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

89. Written comments by the public on the proposed and/or modified information collections are due April 9, 1999, and replies on or before April 26, 1999. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 445 Twelfth St. S.W., Washington, DC 20554, Room 1-C804, or via the Internet to dconway@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 Seventeenth Street N.W., Washington, D.C. 20503, or via the Internet to fain_t@al.eop.gov.

90. Alternative formats (computer diskette, large print, audio cassette and Braille) of this Report and Order and Further Notice of Proposed Rulemaking are available to persons with disabilities by contacting Martha Contee at (202) 418-0260 voice, (202) 418-2555 TTY, or mcontee@fcc.gov. The Notice can also be downloaded at: http://www.fcc.gov/dtf/.

IV. Ordering Clauses

91. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i) and (j), 201-209, 218-222, 251, 254, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-209, 218-222, 251, 254, and 403, that this order IS ADOPTED.

92. IT IS FURTHER ORDERED that section 69.152 of the Commission's rules, 47 C.F.R.

§ 69.152, IS AMENDED as set forth in Appendix B.

93. IT IS FURTHER ORDERED that the policies, rules, and requirements adopted herein SHALL BE EFFECTIVE July 1, 1999.

94. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i), 4(j), 201-205, 218-220, 225, and 254 of the Communications Act as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, 218-220, 225, and 254, a Further Notice of Proposed Rulemaking IS HEREBY ADOPTED.

95. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, References Operations Division, SHALL SEND a copy of this Report and Order and Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Certification and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission

Magalie Roman Salas
Secretary

Appendix A: List of Parties

Commenters

1. Ameritech
2. Bell Atlantic Telephone Companies (Bell Atlantic)
3. BellSouth Corporation (BellSouth)
4. California, People of the State of, and the Public Utilities Commission of the State of California (Calif. Public Utils. Comm'n)
5. Cox Communications Inc. (Cox)
6. GTE Service Corporation (GTE)
7. MCI Telecommunications Corporation (MCI)
8. New York State Telecommunications Association (N.Y. Telecom. Ass'n)
9. Rural Telephone Coalition (RTC)
10. Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (SBC)
11. Sprint Corporation (Sprint)
12. U S WEST Inc. (U S WEST)
13. United States Telephone Association (USTA)
14. Welch, Lyman C. (Welch)

Reply Commenters

1. Ameritech
2. AT&T Corporation (AT&T)
3. Bell Atlantic
4. BellSouth
5. Cox
6. GTE
7. MCI
8. RTC
9. SBC
10. Sprint
11. U S WEST
12. USTA

Appendix B: Final Rules

Amendments to the Code of Federal Regulations

Part 69—Access Charges

1. The authority citation for part 69 continues to read as follows:

Authority: 47 U.S.C. 154, 201, 202, 203, 205, 218, 220, 254, 403.

2. Section 69.152 is amended by adding paragraph (h) to read as follows:

§ 69.152 End user common line for price cap local exchange carriers.

* * * * *

(h) Only one of the residential subscriber lines a price cap LEC provides to a location shall be deemed to be a primary residential line.

(1) For purposes of section 69.152(h), "residential subscriber line" includes residential lines that a price cap LEC provides to a competitive LEC that resells the line and on which the price cap LEC may assess access charges.

(2) If a customer subscribes to residential lines from a price cap LEC and at least one reseller of the price cap LEC's lines, the line sold by the price cap LEC shall be the primary line, except that if a resold price cap LEC line is already the primary line, the resold line will remain the primary line should a price cap LEC subsequently sell an additional line to that residence.

March 8, 1999

STATEMENT OF COMMISSIONER
HAROLD FURCHTGOTT-ROTH DISSENTING IN PART

Re: *Report and Order & Further Notice of Proposed Rulemaking Defining Primary Lines, CC Docket 97-181.*

I dissent in part from today's decision because of my concerns regarding the practicality of continuing to differentiate between primary and secondary residential lines. Although responsible for the Presubscribed Interexchange Carrier Charge (PICC), interexchange carriers frequently do not have the information necessary to determine what is a primary and what is a secondary residential line. While today's Order begins to address this issue, I would have preferred to eliminate the distinction, charging all residential lines one flat fee. I fear that the administrative costs of continuing this distinction outweigh any benefits from charging higher fees for second lines. Indeed, I note that the actual cost of an additional residential line is likely to be less -- not more -- than the cost of an initial one. Thus, I would have eliminated the non-primary lines category for both subscriber line charges (SLCs) and PICCs, leaving a single cap for all residential lines.